

No. 23-3787

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LOURDES MATSUMOTO, et al.,

*Plaintiffs-Appellees,*

*v.*

RAÚL LABRADOR, in his capacity as  
the Attorney General for the State of Idaho,

*Defendant-Appellant,*

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

No. 1:23-cv-00323-DKG  
The Honorable Debora K. Grasham

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**SUPPLEMENTAL EXCERPTS OF RECORD  
VOLUME 1 OF 1**

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RAÚL R. LABRADOR  
*Attorney General*

Idaho Office of the Attorney General  
700 W. Jefferson St.  
Suite 210  
Boise, ID 83720  
(208) 334-2400  
josh.turner@ag.idaho.gov  
james.craig@ag.idaho.gov  
aaron.green@ag.idaho.gov

JOSHUA N. TURNER  
*Chief of Constitutional  
Litigation and Policy*

James E. M. Craig  
*Chief, Civil Litigation and  
Constitutional Defense*

Aaron M. Green  
*Deputy Attorney General*

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RAÚL R. LABRADOR  
ATTORNEY GENERAL

JOSHUA N. TURNER, ISB #12193  
Acting Solicitor General

JAMES E. M. CRAIG, ISB #6365  
Chief, Civil Litigation and  
Constitutional Defense

Office of the Attorney General  
P. O. Box 83720  
Boise, ID 83720-0010  
Telephone: (208) 334-2400  
Facsimile: (208) 854-8073  
josh.turner@ag.idaho.gov  
james.craig@ag.idaho.gov

*Attorneys for Defendant*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

LOURDES MATSUMOTO,  
NORTHWEST ABORTION ACCESS  
FUND, and INDIGENOUS IDAHO  
ALLIANCE

*Plaintiffs,*

*v.*

RAÚL LABRADOR, in his capacity  
as the Attorney General for the State  
of Idaho

*Defendant.*

Case No. 1:23-cv-00323-DKG

**DECLARATION OF  
JAMES E. M. CRAIG**

I, JAMES E. M. CRAIG, 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 Judge Jason Scott's decision dated December 29, 2023, in Adkins, et al. v. State of Idaho, et al., CV01-23-14744.

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

DATED: January 2, 2024.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

By: /s/ James E. M. Craig  
JAMES E. M. CRAIG  
Chief, Civil Litigation and  
Constitutional Defense

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 2, 2024, 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:

Cristina Sepe  
cristina.sepe@atg.wa.gov

Jamila Asha Johnson  
jjohnson@lawyeringproject.org

Emily A MacMaster  
emacmaster07@gmail.com  
emily@macmasterlaw.com

Kelly O'Neill  
koneill@lagalvoice.org

Emma Grunberg  
emma.grunberg@atg.wa.gov

Paige Butler Suelzle  
psuelzle@lawyeringproject.org

Wendy Olson  
wendy.olson@stoel.com  
docketclerk@stoel.com  
emina.hasonovic@stoel.com  
hillary.bibb@stoel.com  
karissa.armbrust@stoel.com  
kelly.tonikin@stoel.com  
tracy.horan@stoel.com

Wendy S. Heipt  
wheipt@legalvoice.org

*Counsel for Plaintiffs*

By: /s/ James E. M. Craig  
JAMES E. M. CRAIG  
Chief, Civil Litigation and  
Constitutional Defense

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# Exhibit A

Case 1:23-cv-00323-DKG Document 50-2 Filed 02/07/24 Page 2 of 24  
Filed: 02/07/2024  
Fourth Judicial District, Ada County  
**Trent Tripple, Clerk of the Court**  
By: Deputy Clerk - Maxwell, Kari

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. CV01-23-14744

MEMORANDUM DECISION AND  
ORDER ON MOTION TO DISMISS

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

MEMORANDUM DECISION AND ORDER ON MOTION TO DISMISS - 1

## I.

### BACKGROUND

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

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



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

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

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

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

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

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

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

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

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

(*Id.* ¶ 320.)

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

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

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

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

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

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

## II.

### LEGAL STANDARD

#### A. Defendants’ Rule 12(b)(1) motion

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

**B. Defendants’ Rule 12(b)(6) motion**

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

**III.****ANALYSIS**

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

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

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

“Idaho courts have, again and again, reaffirmed a commitment to the federal standards for Idaho’s standing doctrine.” *Tidwell v. Blaine Cnty.*, \_\_\_ Idaho \_\_\_, \_\_\_, 537 P.3d 1212, 1221 (2023) (collecting cases). Under federal standards, “[t]he standing inquiry focuses on whether the plaintiff is the proper party to bring this suit.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Or, as the Idaho Supreme Court recently put it, “[w]hen an issue of standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking the relief,” because “a party can have standing to bring an action, but then lose on the merits.” *Midtown Ventures, LLC v. Capone*, No. 49679, 2023 WL 8499308, at \*5 (Idaho Dec. 8, 2023) (quoting *Bagley v. Thomason*, 149 Idaho 806, 808, 241 P.3d 979, 981 (2010)).

Defendants argue, essentially, that Governor Little, Attorney General Labrador, and the Board of Medicine have so little authority to enforce Idaho’s Abortion Laws that no one—Plaintiffs included—may sue them on the grounds Plaintiffs have sued them. (*See* Mem. Supp. Defs.’ Mot. Dismiss 19–23.)

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

1. Claim I: the claim for a declaratory judgment

Claim I, described more fully above, seeks a declaratory judgment concerning the circumstances in which I.C. §§ 18-622(2) and 18-8801(5) allow abortions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

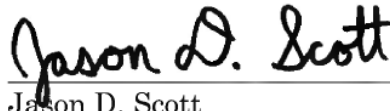
Second, while "the pursuit of an occupation is a liberty and property interest to which . . . due process protections . . . attach and may not be prohibited by the legislature unless necessary to protect the health, safety or welfare of the citizenry," the constitutional right to pursue an occupation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

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

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

Accordingly,

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

A handwritten signature in black ink that reads "Jason D. Scott". The signature is written in a cursive, slightly slanted style.

12/29/2023 9:12:01 AM

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Jason D. Scott  
DISTRICT JUDGE

CERTIFICATE OF SERVICE

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

Scott McKay  
Valeri Kiesig  
NEVIN, BENJAMIN & McKAY LLP  
smckay@nbmlaw.com  
vkiesig@nbmlaw.com

Gail Deady  
Marc Hearron  
Kulsoom Ijaz  
Samantha D. Rasay  
CENTER FOR REPRODUCTIVE RIGHTS  
gdeady@reprorights.org  
mhearron@reprorights.org  
kijaz@reprorights.org  
jrasay@reprorights.org

Leah Godesky  
Anna T. Pletcher  
Hannah Dunham  
David Cohen  
Sara Pahlavan  
O'MELVENY & MYERS, LLP  
lgodesky@omm.com  
apletcher@omm.com  
hdunham@omm.com  
dcohen@omm.com  
spahlavan@omm.com

James E. M. Craig  
OFFICE OF THE ATTORNEY GENERAL  
james.craig@ag.idaho.gov



TRENT TRIPPLE  
Clerk of the District Court

By: Kari Maxwell  
Deputy Court Clerk