RAÚL R. LABRADOR
ATTORNEY GENERAL

JAMES E. M. CRAIG, ISB #6365
Acting Division 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
james.craig@ag.idaho.gov

Attorney for Defendants

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

JENNIFER ADKINS, *et al.*,

Plaintiffs,

v.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV01-23-14744

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

COME NOW Defendants, by and through the undersigned counsel, and hereby files this Memorandum in Support of the Defendants' Motion to Dismiss.

INTRODUCTION

In *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 522 P.3d 1132 (2023), the Idaho Supreme Court held, in no uncertain terms, that the Idaho Constitution does not contain a right to abortion. The Supreme Court analyzed the issue under the inalienable rights clause of Article I, § 1, the Equal Protection Clause of Article I, §§ 1, 2, the Due Process clause of Article I, § 13, the search and seizure clause of Article I, § 17, and the reserved rights clause of Article I, § 21. *Id.* at 403–04,

442, 522 P.3d at 1161–62, 1200. Each time, the Court did not equivocate, but stated as clearly as possible that the Idaho Constitution *contains no right to an abortion*, and that Idaho's laws criminalizing abortion are constitutional. The Court's holding was made as clear as possible in part to avoid a "never-ending cycle of legislative enactment followed by protracted litigation." *Id.* at 437, 522 P.3d at 1195. The Court made it clear that the judiciary's role is not to serve as an "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards," but instead "to remain faithful to the fixed rule of law this Court has been following for over 130 years." *Id.* (internal quotations omitted).

The Plaintiffs, however, are seeking to continue this "never-ending cycle of … protracted litigation" by asking this Court to serve as an "ex officio medical board," and by repeating claims that the Idaho Supreme Court clearly rejected in *Planned Parenthood*. Plaintiffs have simply repackaged and regurgitated claims previously rejected by the Idaho Supreme Court in the hopes that they can convince this Court to find a right to abortion that the Idaho Supreme Court has expressly held does not exist. While the Plaintiffs have the right to disagree with the legitimate policy choices made by the Idaho legislature, their remedy is not with this Court, but with the democratic process through the ballot box. *Id.* ("If the people of Idaho are dissatisfied with the policy choices the legislature has made or wish to enshrine a right to abortion in the Idaho Constitution, they can make these choices for themselves through the ballot box."). Therefore, the Court should dismiss the Plaintiffs' Complaint.

STATEMENT OF FACTS

The Plaintiffs filed this lawsuit seeking a declaratory judgment that Idaho's Defense of Life Act, Idaho Code § 18-622, and Fetal Heartbeat Preborn Child Protection Act, chapter 88, Title 18, Idaho Code, are unconstitutional. They also ask that the Defendants be prohibited from enforcing the statutes. More specifically, they ask the Court to read into the statutes exceptions that do not currently

exist. *See* Complaint at ¶¶ 319, 320, 324, 329, 332, 333. The Defendants were served with the Complaint and Summons on September 13, 2023, and now file this motion to dismiss.

The Plaintiffs' Complaint contains five claims for relief. Plaintiffs have failed to state a valid claim for relief for any of the claims. Thus, the Court should dismiss all of the claims under I.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted. For Claim II, in addition to failing to state a valid claim for relief, there is no actual or justiciable controversy given the hypothetical nature of the claim. Thus, the Court should also dismiss claim II under I.R.C.P. 12(b)(1) for lack of subject-matter jurisdiction. Finally, the Plaintiffs do not have standing to pursue this action against the Idaho Board of Medicine ("the Board"), Governor Little, or Attorney General Labrador, and therefore the Court should also dismiss the claims against those defendants under I.R.C.P. 12(b)(1) due to the Plaintiffs' lack of standing.

STANDARD OF DECISION

A court must dismiss a claim for failure to state a claim upon which relief can be granted under I.R.C.P. 12(b)(6) when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Geringer Cap. v. Taunton Properties, LLC*, 172 Idaho 95, 100, 529 P.3d 760, 765 (2023) (internal quotations omitted). "A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated." *Fulfer v. Sorrento Lactalis, Inc.*, 171 Idaho 296, 300, 520 P.3d 708, 712 (2022) (internal quotations and citation omitted). The Court must determine "whether the non-movant has alleged sufficient facts in support of his claims, which if true, would entitle him to relief." *Id.* "[T]he Court draws all reasonable inferences in favor of the non-moving party." *Id.*

"[J]usticiability challenges are subject to Idaho Rule of Civil Procedure 12(b)(1) since they implicate jurisdiction." *Tucker v. State*, 162 Idaho 11, 18, 394 P.3d 54, 61 (2017). Rule 12(b)(1) facial

challenges "provide the non-movant the same protections as under a 12(b)(6) motion … and the standard of review mirrors that used under 12(b)(6)." *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 133 n.1, 106 P.3d 455, 459 n.1 (2005). A facial challenge includes situations in which the moving party challenges "only the legal conclusions reached within the four corners of the … complaint." *Id.*

A party seeking to establish standing must allege three things: "(1) a distinct palpable injury in fact, (2) a substantial likelihood the judicial relief requested will prevent or redress the claimed injury, and (3) a causal connection fairly traceable between the injury and the conduct complained of." *Id.* (citing *Valencia v. St. Alphonsus Med. Ctr.-Nampa, Inc.*, 167 Idaho 397, 401–02, 470 P.3d 1206, 1210–1211 (2020)).

ARGUMENT

I. Plaintiffs fail to state a claim upon which relief may be granted.

A. The Plaintiffs' first claim of relief improperly asks the Court to legislate by adding exceptions that do not currently exist in the statute.

In their first claim for relief, the Plaintiffs ask the Court to re-write Idaho Code § 18-622(2) and Idaho Code § 18-8801(5) to add numerous exceptions to the criminalization of abortion. They are asking the Court to declare that the statutes allow abortions in situations in which the pregnant female[1] "has an emergent medical condition that poses a risk of death or a risk to their health (including their fertility);" in situations in which a pregnant female 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;" in situations in which the pregnant woman has a medical

[1] The Plaintiffs repeatedly use the phrase "pregnant people" in their complaint. However, as the Idaho Supreme Court noted, "[o]nly women are capable of pregnancy, thus, only women can have an abortion." *Planned Parenthood*, 171 Idaho at 440, 522 P.3d at 1198. In addition, Idaho's abortions laws refer to the "pregnancy of a woman" and a "pregnant woman." Idaho Code §§ 18-604(1); 18-622(2)(a); and 18-8804. Therefore, this brief will refer to a "pregnant woman" or, when the plural is necessary, "pregnant women," not "pregnant people."

condition that is exacerbated by pregnancy, cannot be effectively treated during pregnancy, or requires recurrent invasive intervention;" and in situations in which there is "a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth." Complaint at ¶¶ 319-320.

While this Court certainly has the authority to interpret statutes and constitutions, and certainly has the authority to declare statutes unconstitutional where those statutes do indeed violate the Idaho or the U.S. Constitutions, this Court lacks the authority to legislate. Idaho Constitution, Art. III, § 1 states that the "legislative power of the state shall be vested in a senate and house of representatives." Further, Article II, § 1 of the Idaho Constitution provides that there are three branches of government, the legislative, the executive, and the judicial, and that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." To grant the Plaintiffs' requested relief would require this Court to legislate, to rewrite the statutes and write exceptions into the statutes that do not exist. The Idaho Constitution prohibits the Court from legislating. *See Doe II v. Doe I*, 160 Idaho 360, 362, 372 P.3d 1106, 1108 (2016) ("The legislature and the legislature only, under our constitution, has power to legislate.") (quoting *Thomas v. Riggs*, 67 Idaho 223, 228, 175 P.2d 404, 407 (1946)). Essentially, the Plaintiffs, unhappy with the state of the law and apparently unable to convince the legislature to write a law they are satisfied with, have now asked this Court to do what the legislature has chosen not to do—rewrite the statutes to include their desired exceptions.

Idaho Code § 18-622(2) contains an exception to the crime of criminal abortion where the "physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman." The Idaho Supreme Court in *Planned Parenthood*, 171 Idaho at 445, 522 P.3d at 1203, stated that this

exception[2] "leaves wide room for the physician's 'good faith medical judgment' on whether the abortion was 'necessary to prevent the death of the pregnant woman' based on those facts known to the physician at that time." Nevertheless, Idaho Code §§ 18-622 and 18-8801 simply do not contain an exception in situations that simply pose a "risk to the[] health," of a pregnant woman, a "risk of infection, bleeding, or otherwise makes a pregnancy unsafe," or that "exacerbate[es]" a pregnant woman's pre-existing medical condition." Complaint at ¶¶ 319-320. To say otherwise would be to re-write the statutes.

Similarly, while the Plaintiffs ask the Court to declare an exception "where the fetus is unlikely to survive the pregnancy and sustain life after birth," Complaint ¶ 320, neither Idaho Code § 18-622 nor the definition of abortion in Idaho Code § 18-604(1) contains such an exception. If the unborn child has already died, Idaho Code § 18-604(1)(b) declares that the removal of the dead unborn child is not an abortion, and thus not a criminal act, and the removal of an ectopic or molar pregnancy is likewise not considered to be an abortion under Idaho Code § 18-604(1)(c). But there is no exception for situations in which the "fetus is unlikely to survive the pregnancy and sustain life after birth."

Similarly, while Idaho Code § 18-8804, which prohibits abortions when a fetal heartbeat has been detected, allows abortions in situations in which there is a "medical emergency," the definition of medical emergency is not as broad as the Plaintiffs would like the Court to declare. "'Medical emergency' means a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." Idaho Code § 18-8801(5). It does not allow an abortion when there is a "risk to

[2] At the time the Idaho Supreme Court issued its decision in *Planned Parenthood*, the exception to prevent the death of the pregnant woman was an affirmative defense. 171 Idaho at 445, 522 P.3d at 1203. The Idaho Legislature amended the statute in the 2023 legislative session to change that affirmative defense to constitute an exception. *See* 2023 Idaho Sess. Laws ch. 298, p. 907–908.

the[] health" of a pregnant woman, unless that risk is a "serious risk of substantial and irreversible impairment of a major bodily function." It does not allow for an abortion when there is a "risk of infection, bleeding, or" when continuing the pregnancy is unsafe, unless an immediate abortion is necessary to avert the creation of a "serious risk of substantial and irreversible impairment of a major bodily function."

Again, just like there is no exception under Idaho Code § 18-622 to allow for an abortion in situations in which the physician believes that the unborn child is unlikely to survive after birth; Idaho Code § 18-8801(5) does not allow for an abortion in situations in which the child is unlikely to survive after birth, unless the abortion is immediately necessary to prevent a "serious risk of substantial and irreversible impairment of a major bodily function" to the pregnant woman.

Rather, the legislature has made a policy decision fully within its constitutional authority to "prefer, by all legal means, live childbirth over abortion," even in cases in which a physician believes that the child will die shortly after birth. Idaho Code § 18-601. Indeed, the Idaho Supreme Court has stated that the legislature's goal in enacting these statutes was to, in part, "protect[] prenatal fetal life at all stages of development where there is *some* chance of survival outside the womb." *Planned Parenthood*, 171 Idaho at 445, 522 P.3d at 1203 (emphasis in original). The statutes simply do not allow for an abortion in situations in which an unborn child is "unlikely" to survive after birth.

In order for the Court to rule in favor of the Plaintiffs on the Plaintiffs' first claim, the Court would have to "usurp[] the policy-making role of the legislature and violate[] [its] obligation to maintain the separation of powers that forms the basis of our government." *Planned Parenthood*, 171 Idaho at 437, 522 P.3d at 1195. If the Plaintiffs are unhappy with the policy choices the legislature has made, their remedy is through the democratic process, not to attempt to convince the courts to make a different policy decision and rewrite the statute. As stated by the Idaho Supreme Court, "[i]f the people of Idaho are dissatisfied with the policy choices the legislature has made … they can make

these choices for themselves through the ballot box." *Id.* Similarly, if the Plaintiffs are dissatisfied with the policy choices the legislature has made, the Plaintiffs can attempt to convince the people of the State of Idaho to make changes through the ballot box.

B. Claim II should be dismissed because it asks the Court to issue an advisory opinion on a hypothetical set of facts.

The Plaintiffs' claim for relief under Claim II asks the Court to declare that enforcement of the criminal abortion laws against any physician who performs an abortion consistent with Plaintiffs' claimed exceptions would be ultra vires. Complaint at ¶ 324. This claim necessarily rests upon the Court issuing a favorable ruling on the Plaintiffs' other claims in which the Plaintiffs ask this Court to find within the Idaho Constitution a constitutional right to abortion which the Idaho Supreme Court has rejected. Thus, the claim should be dismissed under I.R.C.P. 12(b)(6) for failure to state claim. However, Claim II also rests upon a hypothetical set of facts that calls upon this Court to issue an advisory opinion, and should therefore also be dismissed under I.R.C.P. 12(b)(1).

The Plaintiffs' second claim for relief is essentially a request that the Court provide an advisory opinion related to hypothetical future enforcement of the abortion statutes in an undefined set of facts. While the Uniform Declaratory Judgment Act allows the Court to "declare rights, status, and other legal relations," Idaho Code § 10-1201, it does not allow the Court to "grant declaratory judgments which merely answer a moot or abstract question." *Idaho Schools for Equal Educational Opportunity*, 128 Idaho 276, 282, 912 P.2d 644, 650 (1996). "One of the prerequisites to a declaratory judgment action is an actual or justiciable controversy." *Id.* 128 Idaho at 281, 912 P.2d at 649. "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot." *Id.* (quoting *Weldon v. Bonner Cnty. Tax Coalition*, 124 Idaho 31, 36, 855 P.2d 868, 873 (1993)). "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising

what the law would be upon a hypothetical state of facts." *Id.* at 282, 855 P.2d at 650. Importantly, the requirement that there must be "an actual or justiciable controversy … precludes courts from deciding cases which are purely hypothetical or advisory." *Wylie v. State*, 151 Idaho 26, 31, 253 P.3d 700, 705 (2011) (quoting *State v. Rhoades*, 119 Idaho 594, 597, 809 P.2d 455, 458 (1991)).

The Plaintiffs claim that "[a]ny official's 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 condition for which abortion would prevent or alleviate a risk of death or risk to their health (including their fertility) would be inconsistent with the Medical Exceptions to Idaho's abortion bans and therefore would be ultra vires." Complaint at ¶ 324. The Defendants discussed the Plaintiffs' erroneous claim that the abortion statutes should be interpreted in such a way to allow the exceptions desired by Plaintiffs above, and that will not be repeated here. However, the request for relief on the grounds that enforcement of the act would be "ultra vires" is meritless.

"An ultra vires act is an act that is '[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or law.'" *Taylor v. Taylor*, 163 Idaho 910, 918, 422 P.3d 1116, 1124 (2018) (quoting *Black's Law Dictionary* 1755 (10th ed. 2014)) (alteration in original). The Plaintiffs' claim simply states that "any official's" enforcement of the act in contravention of the broad exceptions desired by Plaintiffs is ultra vires, but the Plaintiffs do not specify which officials. Thus, the Court is left to speculate as to which officials the Plaintiffs claim lack authority to enforce the act—a law enforcement agency, a county prosecutor, the Attorney General, the Governor, the Idaho Board of Medicine, or a judge enforcing the provisions after a person files a civil cause of action under Idaho Code § 18-8807. The statutes are clear in their specification of which officials in which situations have the authority to enforce the acts.

By declaring the provision of an abortion in most situations to be a felony crime, *see* Idaho

Code §§ 18-622(1), 18-8805(2), the statute brings in all of the criminal enforcement authority of the law enforcement agencies across the state. Upon a conviction, a court would have the obligation of imposing a lawful sentence. Further, Idaho Code § 18-8807 allows for certain defined persons to bring a civil cause of action against a medical professional for performing an abortion in violation of the act. Should that person successfully prove the claim, a court would be obligated to enter a judgment in that person's favor. Any of these persons and officials operating under the authority granted by the statute could not be acting ultra vires by bringing an expressly authorized action.

Whether the specific facts of a hypothetical future case are sufficient for a conviction or civil judgment will necessarily depend on the specific facts of the case, if a case is ever filed or prosecuted. But, without a defined set of actual facts under this claim for relief, the Court is left with nothing more than speculation as to whether an official would have authority to enforce the act.

Even if the Plaintiffs were to present a hypothetical set of facts, the law does not allow the Court to issue an opinion based upon a hypothetical future scenario. *See Wylie*, 151 Idaho at 31, 253 P.3d at 705. To rule on Plaintiffs' claim, the Court would have to assume facts related to a hypothetical future enforcement of the statutes, requiring the Court to render an advisory opinion. The declaratory judgment act does not allow the Court to issue an advisory opinion in this manner, and the Court should therefore dismiss Claim II on justiciability grounds for lack of an actual case or controversy.

C. The Idaho Supreme Court has clearly held that the Inalienable Rights Clause of the Idaho Constitution does not provide for a right to abortion.

The Plaintiffs' third claim for relief argues that Article I, § 1 of the Idaho Constitution "require[s] that a pregnant person be permitted to receive abortion care in Idaho when the pregnant person has 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 that risk." Complaint at ¶ 332. However, the Idaho Supreme Court has already addressed this issue and rejected the claim that the inalienable

rights clause contained in Article I, § 1 of the Idaho Constitution protects a right to abortion. Rather, the Court stated in no uncertain terms that "a 'right to abortion' is not part of Idaho's 'ordered liberty' such that it could be implicitly protected and *read into*, the Inalienable Rights Clause in the Idaho Constitutional as a fundamental right." *Planned Parenthood*, 171 Idaho at 418, 522 P.3d at 1176 (emphasis in original). After a lengthy discussion of the ordered liberty test and whether a so called right to an abortion was deeply rooted in this State's history and traditions, the Court repeated its holding and stated that "there is nothing to support the conclusion that either the framers of the Inalienable Rights Clause, or the people of Idaho in 1889, intended that provision to enshrine abortion as a fundamental right." *Id.* at 430, 522 P.3d at 1188.

It appears, however, that Plaintiffs are trying to reframe the issue by stating that there is a right to abortion when the pregnant woman "has an emergent medical condition that poses a risk of death or risk to [her] health (including [her] fertility), and an abortion would prevent or alleviate such risk." Complaint at ¶ 332. The Idaho Supreme Court also rejected this argument. In the *Planned Parenthood* case, Justice Zahn, dissenting from the majority opinion, argued that "because Idaho statutes historically contained an exception to the criminalization of abortion to 'save' (later changed to 'preserve') the life of a mother, this statutory exception warrants the conclusion that there is an implicit fundamental right to abortion to prevent the death of the mother and *to protect her health from injury, harm, or destruction*." *Id.* at 435, 522 P.3d at 1193 (emphasis added).

The majority rejected that reasoning, stating that "preexisting statutes and the common law may be used to help inform our interpretation of the Idaho Constitution, but they are not the embodiment of, nor are they incorporated within, the Constitution." *Id.* (internal quotations omitted).

> The legislature's decision to redefine an exception to the criminalization of abortion does not necessarily mean that the framers of our Constitution intended to enshrine the excepted conduct as a fundamental right. The more logical explanation is that the framers … viewed abortion as a subject the legislature was free to regulate through its police powers like any other conduct. Thus, while the decision to change the word 'save' to 'preserve' was a policy decision within the plenary power of the legislative

> body, it does not equate to the recognition of a fundamental right that must be recognized by the judiciary.

Id. at 436, 522 P.3d at 1194.

Thus, the Idaho Supreme Court in the *Planned Parenthood* case explicitly rejected the Plaintiffs' claim, and the Court should therefore dismiss the Plaintiffs' third claim for relief.

D. The criminal abortion statutes do not violate equal protection.

Under their fourth claim for relief, Plaintiffs argue that the abortion statutes violate a pregnant woman's "right to equal treatment under the law," because "the abortion bans bar or delay the provision of abortion to a pregnant person with an emergent medical condition that poses a risk of death or risk to their health (including their fertility), while allowing non-pregnant people and people unable to get pregnant to access medical treatment for emergent medical conditions." Complaint at ¶ 337. However, the Idaho Supreme Court has already considered an Equal Protection challenge to the statutes and has already concluded that the challenged statutes "do not violate the Equal Protection Clause in the Idaho Constitution." *Planned Parenthood*, 171 Idaho at 442, 522 P.3d at 1200. Since the Idaho Supreme Court has already decided the issue, Plaintiffs' Equal Protection claim fails, and the Court should dismiss Plaintiffs' claim. Nevertheless, should the Court determine that the Plaintiffs' Equal Protection claim is somehow different than what was decided by the Idaho Supreme Court, it still fails.

The "equal protection analysis 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 439, 522 P.3d at 1197 (quotations omitted).

i. Although the statute classifies doctors who do or do not provide abortions, the Plaintiffs' classification also confirms rational basis review applies.

For the first step of the analysis, the Court must identify the classification under attack. The statute classifies doctors who provide abortions against doctors who do not provide abortions. *Planned Parenthood*, 171 Idaho at 442, 522 P.3d at 1200 ("The only classification these laws create is between medical providers who perform or assist in abortions and medical providers who do not."). The Plaintiffs, perhaps in an attempt to distinguish the instant case from *Planned Parenthood*, argue that the statute discriminates between those who are pregnant and those who are not pregnant or who are unable to get pregnant. *See* Complaint at ¶ 336-37. Though this classification has been rejected by the Idaho Supreme Court, even if this Court examined a pregnant-woman-versus-non-pregnant-person classification, that classification does not help Plaintiffs. As discussed below, the Plaintiffs' Equal Protection claim still fails using that classification.

ii. The applicable standard is rational basis.

The second step is for the Court to identify the level of scrutiny under which the classification will be examined. There are "three standards of review for equal protection challenges to a statute under the Idaho Constitution: strict-scrutiny, means-focus, and rational basis." *Planned Parenthood*, 171 Idaho at 439, 522 P.3d at 1197. "Strict scrutiny applies if the statute discriminates on the basis of a suspect classification," or where the court reviews "the constitutionality of a statute that involves a fundamental right." *Id.* (quotations omitted).

A classification is suspect where it is "based on nationality, race, or religion." *Osick v. Public Employee Retirement System of Idaho*, 122 Idaho 457, 462, 835 P.2d 1268, 1273 (1992). In this case, the Plaintiffs' alleged classification is not a suspect class. *See Planned Parenthood*, 171 Idaho at 440, 522 P.3d 1198 (holding that the classifications created by the statutes are not subject to a heightened level of review). Further, the Idaho Supreme Court has already determined that the Idaho Constitution does

not contain a fundamental right to abortion, and that strict scrutiny does not apply when reviewing the abortion statutes under attack in the instant case. *See Planned Parenthood*, 171 Idaho at 439, 522 P.3d at 1197. Thus, strict scrutiny does not apply.

"The means-focus test only applies when the discriminatory character of a challenged statutory classification is (1) apparent on its face and (2) where there is also a patent indication of a lack of a relationship between the classification and the declared purpose of the statute." *Id.* at 440, 522 P.3d at 1198 (quotations and citations omitted).

To satisfy the first prong in determining whether the means-focus test applies, "the classification created by the statute must be obviously and invidiously discriminatory." *Id.* (internal quotations omitted). Not every "legislative classification which treats different classes of people differently can be said to be discriminatory, much less obviously invidiously discriminatory." *Id* (internal quotations omitted). "For a classification to be obviously and invidiously discriminatory it must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." *Id.* (internal quotations omitted).

Again, the Idaho Supreme Court has already held that "there is not an obvious and invidious discriminatory motive within the Total Abortion Ban, 6-week ban, and Civil Liability Law." *Id.* While the *Planned Parenthood* case looked at it under a sex-based classification argument, and a classification based on physicians who perform abortions and those who do not perform abortions, the Court's reasoning applies equally here. Pregnant women and those who are not pregnant or cannot become pregnant "are not similarly situated when it comes to pregnancy and abortion." *Id.* Obviously, only a woman who is pregnant can have an abortion. Thus, there cannot be an "obvious and invidious discriminatory motive" within the challenged laws.

Even assuming an "obvious and invidious discriminatory motive," the Plaintiffs cannot satisfy the second prong of the test, which asks whether there exists "a patent indication of a lack of a

relationship between the classification and the declared purpose of the statute." *Id.* (citation omitted). The obvious purpose of the statutes is to protect the life of the unborn child, or, put in another way, to "protect[] prenatal fetal life at all stages of development where there is *some* chance of survival outside the womb." *Id.* at 445, 522 P.3d at 1203. Again, to state the obvious, only a pregnant woman can have an abortion, and only a pregnant woman can carry an unborn child within her, and therefore there is a clear relationship in the classification of the statute distinguishing between women who are pregnant and people who are not pregnant or cannot become pregnant. Thus, the statute is not subject to the means-focus test.

Although this claim is brought under the Idaho Constitution's Equal Protection Clause, federal jurisprudence is instructive. *See id. (citing Rudeen v. Cenarrusa,* 136 Idaho 560, 568, 38 P.3d 598, 606 (2001)). In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the U.S. Supreme Court confronted an equal protection challenge to a California statute that excluded from disability coverage certain disabilities resulting from pregnancy. There, the Court remarked that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification…." 417 U.S. at 496 n.20. And it explained that "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis…." *Id.* Here, there is no such invidious discrimination against women or women who are pregnant.

Since the statute is not subject to either strict scrutiny, or the means focus test, "the rational basis test is applied." *Id.* at 440, 522 P.3d at 1198 (internal quotations omitted).

iii. The Statute Meets the Rational Basis Test

Under the third step, the Court must determine whether the applicable standard has been

satisfied. Under the "rational basis test, a classification will pass scrutiny if it is rationally related to a legitimate governmental purpose." *Planned Parenthood,* 171 Idaho at 442, 522 P.3d at 1200 (internal quotations omitted). "Only when a classification is based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be advanced to justify those goals will [the Court] conclude the challenged statute violates the Equal Protection Clause." *Id.* (internal quotations omitted). "The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." *Id.* at 439, 522 P.3d at 1197 (internal quotations omitted). "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning the interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Id.* (internal quotations omitted).

Once again, the Idaho Supreme Court has already decided that "the classifications created by the Total Abortion Ban, 6-Week Ban, and Civil Liability Law are rationally related to legitimate governmental purposes." *Id.* at 442, 522 P.3d at 1200. While the majority in that case was looking at a classification "between medical providers who perform or assist in abortions and medical providers who do not," *id.*, there is no reason why the reasoning of Idaho Supreme Court's conclusion would warrant a different finding where the classification is between women who are pregnant and those who are not pregnant or are unable to become pregnant. Again, to state the obvious, only pregnant women can have an abortion, and thus a classification that distinguishes between pregnant women and those who are not pregnant in order to protect the unborn child by preventing the unborn child from being aborted before the unborn child has a chance to survive outside the womb is rationally related to the governmental purposes of protecting prenatal fetal life. The choice to protect prenatal fetal life "is within the plenary power of the legislature," and it is not this Court's prerogative to "judge the wisdom of that choice on rational basis review." *Id.*

E. The abortion statutes do not violate the due process rights of physicians.

The Plaintiffs' final claim for relief alleges a violation of due process, and alleges that "Idaho-licensed physicians" have a right guaranteed by Article I, §§ 1 and 13 of the Idaho Constitution to "practice their profession by providing abortion to their pregnant patients to treat emergent medical conditions that the physician determines pose a risk to the pregnant [woman's] life or health (including [her] fertility)." Complaint at ¶ 343-44.[3] This attack on the statutes is not a procedural due process claim, "but rather one of substantive due process—the right to be free from arbitrary deprivations of life, liberty or property." *Matter of McNeely*, 119 Idaho 182, 189, 804 P.2d 911, 918 (Ct. App. 1990).

"To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998); *see also Williams v. State*, 153 Idaho 380, 392, 283 P.3d 127, 138 (Ct. App. 2012). The Idaho Supreme Court has stated that "pursuit of an occupation is a liberty and property interest to which the due process protections of the state and federal constitutions attached and may not be prohibited by the legislature unless necessary to protect the health, safety, or welfare of the citizenry." *Jones v. State Bd. of Medicine*, 97 Idaho 859, 868, 555 P.2d 399, 408 (1976). Nevertheless, "[t]his recognition 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." *Id.*

Further, to the extent the physician Plaintiffs are seeking relief under substantive due process, the physician Plaintiffs' claimed interest—the right of physicians to practice their profession by providing abortions—is an economic interest. In this scenario, the substantive due process rational basis test is essentially the same as the test stated above for regulating medical professionals. "For

[3] While the Plaintiffs allege their right under Article I, § 1 of the Idaho Constitution, in addition to Article I, § 13, this section will only address the claimed right under Article I, § 13, since the claimed right under Article I, § 1 is addressed above in relation to the Plaintiffs' other claims for relief.

substantive due process claims, the Court applies the rational basis test's deferential standard of review when dealing with legislation regarding economic interests." *Guzman v. Piercy*, 155 Idaho 928, 940, 318 P.3d 918, 930 (2013) (internal quotations omitted). Under this test, a statute must merely "bear a reasonable relationship to a permissible legislative objective." *Id.* (quoting *In re Jerome Cnty Bd. Of Comm'rs*, 153 Idaho 298, 315, 281 P.3d 107, 1093 (2012)). "Where it is at least debatable that governmental conduct is rationally related to a legitimate government interest, no violation of substantive due process will be found. In this context, legislative acts are presumed valid and only overcome by clearly showing arbitrariness and irrationality." *Id.; see also Matter of McNeely*, 119 Idaho at 189, 804 P.2d at 918 ("When dealing with legislation involving social or economic interests, we assume a deferential standard of review" in which the statute must "have a rational basis—that is, the reason for the deprivation may not be so inadequate that it may be characterized as arbitrary.").

"The rational relationship test is applied under both the substantive due process clause and the equal protection clause in determining the constitutionality of a law that does not deal with a fundamental right." *State v. Bennett*, 142 Idaho 166, 169, 125 P.3d 522, 525 (2005). "Moreover, in a substantive due process challenge, we do not require that the government's legislative acts actually advance its stated purpose, but instead look to whether the governmental body *could* have had no legitimate reason for its decision." *Id.* (cleaned up, emphasis in original). If it is "at least fairly debatable" as to whether the statute "is rationally related to a legitimate governmental interest, there has been no violation of substantive due process." *Id.* (internal quotations omitted).

In the instant case, the Idaho Supreme Court in the *Planned Parenthood* case stated over and over that the statutes challenged here are "rationally related to the government's legitimate interest in protecting prenatal fetal life at all stages of development, and in protecting the health and safety of the mother." *See Planned Parenthood*, 171 Idaho at 390–91, 437, 438, 439, 441, 454, 522 P.3d at 1148–49, 1195, 1196, 1197, 1200, 1213. Since the Idaho Supreme Court has already held that the statute is

rationally related to the government's interest in protecting the health and safety of the public, the Plaintiffs' claim is meritless.

Thus, the statute meets the rational basis test applicable to the physician plaintiffs' substantive due process claim, and the Court should dismiss the Plaintiffs' fifth and last claim for relief.

II. Plaintiffs lack standing to pursue their claims against Defendants Governor Brad Little, Attorney General Raúl Labrador, and the Idaho Board of Medicine.

"It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Hepworth Holzer, LLP v. Fourth Jud. Dist. of State*, 169 Idaho 387, 393, 496 P.3d 873, 879 (2021) (quoting *Haight v. Idaho Dep't of Transp.*, 163 Idaho 383, 391, 414 P.3d 205, 213 (2018)). It is a "jurisdictional issue" which this Court "must address . . . before reaching the merits of the case." *Id.* (citing *State v. Philip Morris, Inc.*, 158 Idaho 874, 879, 354 P.3d 187, 192 (2015) and *Valencia,* 167 Idaho 401–02, 470 P.3d at 1210–1211. "Standing only focuses on the party seeking relief, not on the issue the party wishes to adjudicate." *Id.* (citing *Haight*, 163 Idaho at 391, 414 P.3d at 213). A party seeking to establish standing must allege three things: "(1) a distinct palpable injury in fact, (2) a substantial likelihood the judicial relief requested will prevent or redress the claimed injury, and (3) a causal connection fairly traceable between the injury and the conduct complained of." *Id.* (citing *Valencia*, 167 Idaho at 402, 470 P.3d at 1211).[4]

In *Planned Parenthood*, 171 Idaho at 400, 522 P.3d at 1158, the Idaho Supreme Court stated that "[i]t 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." Thus, while the State of Idaho is

[4] For purposes of this motion, the Defendants will focus only on the second and third parts of the standing analysis. Since standing can be raised at any time, and cannot be waived, the Defendants reserve the right to raise the standing issue again, including whether Plaintiffs have suffered an injury in fact, in future motions in the event the Court denies the instant Motion. *See State v. Garcia*, 159 Idaho 6, 10, 355 P.3d 635, 639 (2015) (stating that "subject matter jurisdiction … cannot be waived and may be raised at any time").

a proper defendant in this action, the same cannot be said for the other defendants.

A. Plaintiffs have failed to allege a causal connection traceable to the actions of Defendants Governor Little, Attorney General Labrador, and the IBOM.

For standing purposes, "[c]ausation requires the injury to 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." *Tucker*, 162 Idaho at 21, 394 P.3d at 64. "[C]ausation looks at the conduct of each particular defendant," and should therefore be analyzed separately for each defendant. *Id.*

Idaho Code §§ 18-622, 18-8804 are penal statutes. As penal statutes, the law both prohibits specific conduct and affixes a penalty to violations of that prohibition. Further, as penal statutes, neither the Governor, the Attorney General, nor the Board have authority to enforce those statutes.

Regarding Governor Little, the law enforcement officials with authority to enforce the statutes, including the elected county prosecuting attorneys, "act independently of Governor [Little], which militates against causation as to him." *Id.* The Governor's "general duty to enforce state laws is not sufficient to establish a causal connection" for standing purposes. *Id.* at 22, 394 P.3d at 65. Further, the county prosecutor has the discretionary authority, independent of the Governor, to determine whether to prosecute a crime. *See, e.g.,* Idaho Code §§ 31-2227, 31-2604. Since the county prosecutors "are left with significant discretion in" determining whether to file criminal charges, independent of the Governor, there is no causation for the Governor for standing purposes. *Tucker*, 162 Idaho at 22, 394 P.3d at 65.

Similarly, the Idaho Board of Medicine has no criminal enforcement authority. The Board's powers and authorities are delineated in Chapter 18, Title 54, Idaho Code. The authority to enforce penal statute lies principally with the respective county sheriffs and prosecutors, and the Board may not initiate a criminal prosecution for violation of a penal code. I.C. § 31-2604(2); I.C. § 31-2227.

A health care professional who is convicted of violating the criminal abortion statutes is

subject to both potential prison sentences and license restrictions. *See* Idaho Code §§ 18-622(1), 18-8805(3).[5] Upon conviction, imposition of the license penalties is mandatory; the Idaho Board of Medicine (Board) has no discretion in whether to enforce those penalties. Where the license suspension is mandatory upon conviction, the cause of the Plaintiffs' alleged injury is the criminal prosecution and criminal conviction of those performing an abortion, *not* the imposition of the license suspension that the Board must impose upon a conviction.

Because the Board has no authority to criminally prosecute anyone, but must perform a ministerial function upon conviction by imposing the mandatory license restrictions, the Plaintiffs cannot show a causal connection fairly traceable between the injury and the conduct complained of. Therefore, the Plaintiffs lack standing against the Board, and the Board should be dismissed from the complaint. *Accord Planned Parenthood Great Nw. v. Labrador*, ___ F.Supp.3d.___, ___, 2023 WL 4864962 at *18 (D. Idaho July 31, 2023) (holding that the Medical Provider Plaintiffs, in challenging Idaho Code § 18-622, failed to prove that the Idaho Board of Medicine "has to prosecute or enforce violations of Idaho's criminal abortion statute," and therefore lacked standing to pursue a motion for preliminary injunction against the Idaho Board of Medicine or the Idaho Board of Nursing).

The Attorney General also lacks authority to enforce the criminal statutes at issue here. While in some limited cases the Attorney General has authority to enforce criminal laws, the Idaho legislature has not given the Attorney General the authority to enforce the Defense of Life Act nor the Fetal Heartbeat Preborn Child Protection Act. *See, e.g.,* Attorney Gen. Op. 23-1 (*available at https://tinyurl.com/bd4wdwus*). The Attorney General, unless given a specific grant of prosecutorial authority from the legislature, only has the authority to enforce criminal laws when a case is referred by a county prosecutor to the Attorney General and a court appoints the Attorney General as a special

[5] The criminal provision in Idaho Code § 18-8805 has been mostly superseded by Idaho Code § 18-622. *See* Idaho Code § 18-8805(4).

prosecutor, or when a prosecutor requests the assistance of the Attorney General and the resources of the Attorney General's Office. *See* Idaho Code § 31-2603(a) and (b); Attorney Gen. Op. 23-1 at 2.

Since the legislature has not given the Attorney General the authority to prosecute violations of these statutes, and since the Plaintiffs have not alleged that any prosecuting attorney has referred a case to the Attorney General or requested the assistance of the Office of the Attorney General in prosecuting any case under these statutes, the Attorney General sits in the same shoes as the Governor for purposes of standing—the Attorney General lacks the authority to enforce these statutes, and therefore the Plaintiffs cannot show a causal connection sufficient to establish standing.

For the above reasons, the Plaintiffs cannot show a causal connection between their alleged injury and Governor Little, Attorney General Labrador, or the Board.

B. The Plaintiffs have not pled a substantial likelihood the judicial relief requested will prevent or redress the claimed injury.

"Standing's redressability element ensures that a court has the ability to order the relief sought, which must create a substantial likelihood of remedying the harms alleged." *Tucker*, 162 Idaho at 24, 394 P.3d at 67. "Redressability requires a showing that a favorable decision is *likely* to redress the injury, not that a favorable decision will *inevitably* redress the injury." *Id.* (cleaned up) (emphasis in original). While redressability and causation "often overlap," the "concepts are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief." *Id.* (internal quotations omitted, citation omitted).

In the instant case, the Plaintiffs request that the "Defendants be permanently enjoined" from enforcing Idaho's abortion laws. *See* Complaint at 91–92. However, an injunction against Governor Little, Attorney General Labrador, and the Board would not prevent any of the 44 county prosecutors from enforcing the criminal laws. As discussed above, each of the county prosecutors have

independent discretion and authority to determine whether to file criminal charges. Thus, an injunction against Governor Little, Attorney General Labrador, and the Board would have no effect. Therefore, the Plaintiffs have also failed to show that they have met the redressability requirement of standing. As such, they lack standing against Governor Little, Attorney General Labrador, and the Board, and the Court should dismiss the Complaint against these defendants for lack of standing.

CONCLUSION

For all of the above reasons, the Court should grant the Defendants' Motion to Dismiss, and dismiss the Complaint with prejudice.

DATED: October 31, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2023, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service:

Scott McKay
smckay@nbmlaw.com

Marc Hearron
mhearron@reprorights.org

Valeri Kiesig
vkiesig@nbmlaw.com

Jen Samanth D. Rasay
jrasay@reprorights.org

Gail Deady
gdeady@reprorights.org

Kulsoom Ijaz
kijaz@reprorights.org

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