RAÚL R. LABRADOR
ATTORNEY GENERAL

YVONNE DUNBAR, ISB #7200
Chief Counsel

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

AARON M. GREEN, ISB #12397
Assistant Solicitor General
KYLE D. GRIGSBY, ISB #10709
Deputy Attorney General
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
aaron.green@ag.idaho.gov
kyle.grigsby@ag.idaho.gov

Attorneys for Defendants Members of the Idaho Board of Medicine, and Intervenor Attorney General Raúl Labrador

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STACY SEYB, M.D.

Plaintiff,

v.

MEMBERS OF THE IDAHO BOARD OF MEDICINE, in their official capacities; *et al.,*

Defendants.

Case No. 1:24-cv-00244-BLW

ATTORNEY GENERAL LABRADOR'S CLOSING ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

Just four years ago, the Supreme Court held that the "the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision," leaving the regulation of abortion to "each State." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231, 302 (2022). Relying on that authority, Idaho enacted two laws to defend unborn children while allowing mothers to make difficult decisions when their own lives are at risk.

Defying *Dobbs*, Plaintiff Stacy Seyb challenges those laws, claiming a fundamental right to an ill-defined class of "therapeutic" abortions. But he lacks standing and points to no provision of the Constitution that protects abortion, explicitly or implicitly.

To begin, Seyb lacks standing to raise the rights of hypothetical future patients. He didn't prove that he's likely to ever perform a "therapeutic" abortion arguably prohibited by Idaho's laws. Trial testimony established that, while Seyb claimed an expansive and non-exhaustive list of supposed medical indications for abortion, the circumstances where an abortion might be needed for a serious health risk that does not risk the mother's life are nonexistent to vanishingly rare. And Seyb wouldn't be able to distinguish those circumstances from ones where Idaho law already allows an abortion. Even after litigating this case for over two years, Seyb still claims he can't understand the law. Tr. 164. That ignorance has led him to endanger his patient's life: he delayed care by airlifting a woman with early signs of a deadly infection to Utah. Tr. 1159–60. She was septic when she arrived. Tr. 1159. He could—and should—have treated his patient in Idaho. Tr. 724; 1159–60.

Seyb's constitutional claims also fail on the merits. *Dobbs* allowed Idaho to enact "laws regulating or prohibiting abortion" subject to rational basis review like "other health and safety measures," 597 U.S. at 237, and it rejected a constitutional right to an abortion "for the preservation of the life *or health* of the mother." *Id.* at 271, 292 (emphasis added). That's the end of this case.

Seyb's claimed right to "therapeutic" abortions also lacks the careful description and

extensive historical pedigree required to recognize an unenumerated fundamental right. He claims the right to perform abortions to mitigate a risk to the mother's health, to prevent death from self-harm, and to terminate a child with a "life-limiting" condition. But his definitions of these claimed rights have shifted during litigation and rely on a physician's subjective calls of when an abortion is medically indicated. Indeed, for the American College of Obstetricians and Gynecologists (ACOG), *every* abortion is medically indicated. Tr. 1067–68. And Seyb's theories echo the dark age of eugenics, with Seyb questioning "[w]hat is the point?" of continuing a pregnancy where a child has certain disabilities. Tr. 132. Seyb's lack of careful description promises "freewheeling judicial policymaking" that delegates Idaho's regulatory authority to doctors. *Dobbs*, 597 U.S. at 240.

Dispositively, Seyb has *no* historical evidence establishing a right to a "therapeutic" abortion. In 1868, 19 states criminalized abortion except when necessary to preserve the mother's life; six more prohibited abortion with a *mens rea* requirement and without an express life exception. Only *one* state authorized abortion to preserve a mother's health; it amended its statute a few years later to criminalize abortion except to preserve the mother's life. And no litigation arose after the Fourteenth Amendment's ratification that invalidated any of these laws.

Nor can Seyb establish a fundamental right by analogy. For unenumerated rights, the historic record must "address the specific right at issue." *Reach Cmty. Dev. v. Dep't of Homeland Sec.*, 174 F.4th 1143, 1147 (9th Cir. 2026). And Seyb cites no cases of self-defense or necessity applied to abortion prosecutions. (Those defenses wouldn't apply because the baby in utero exerts no unlawful force, "therapeutic" abortion is not necessary or proportional, and necessity has vague contours.)

Idaho's laws easily satisfy any level of scrutiny, advancing all interests outlined by *Dobbs*. The only way to advance Idaho's interest in protecting unborn life is to prohibit taking unborn life. This Court should therefore enter judgment for Defendants on all Seyb's claims.

JURISDICTION/STANDING

Seyb's trial presentation often lost sight of the Court's role and the nature of this case. The Court need not—in fact, may not—evaluate all possible abortion practices and potential patients nationwide. Tr. 270–71, 276, 1112 (discussing a diagnostic test that doesn't exist and a treatment that exists only in Virginia); Tr. 340 (discussing those who have no access to medical care—none of whom are Seyb's patients). The only questions are whether *Seyb* has standing to assert a fundamental right of *his own* hypothetical future patients, whether Idaho law impacts any of these hypothetical future patients, and whether Idaho has a sufficient interest in enforcing its laws.

While the Court has allowed this case to move forward despite challenges to Seyb's standing, Seyb must still establish standing by the appropriate level of proof at each stage of the case. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Following trial, it is now abundantly clear that Seyb cannot establish standing by a preponderance of the evidence.

Seyb's theory is that he is likely to treat a woman whose pregnancy risks serious harm to her health yet does not place her life at risk. But Dr. Hughes and Dr. Kraus explained this is a vanishingly small (or nonexistent) subset of patients (depending on how broadly Seyb's right is understood, *see* Section I.B.1, 3, *infra*). Tr. 685–86, 692, 699, 702–03, 1203–06, 1210–11. Seyb is highly unlikely to ever confront such a situation, much less "imminent[ly]." *Lujan*, 504 U.S. at 564 (cleaned up).

Indeed, there is no evidence that Seyb has previously treated any patients whose rights are implicated by the challenged statutes either. That's because Seyb had—and claims he *still* has—no idea what Idaho law allows. Despite testifying that it is "very, very important" for doctors to understand the law, he has received no training on Idaho's laws, has not read the Idaho Supreme Court's opinion explaining the statutes at issue, and incorrectly believed (and remains unsure about whether) a doctor must be "certain" that the mother's death was "imminent" and "inevitable" before performing an abortion. Ex. 2010 at 79–80; Tr. 156, 159–162. So while Seyb described several

situations where he *believes* he had to refer a patient out of state to protect his patients' lives, those abortions could have been performed legally in Idaho. Tr. 1152–60.

Seyb cannot manufacture standing by claiming that those abortions "arguably" would have been illegal—especially not when the statute turns on *his own* good faith judgment, where the government authorities themselves are disclaiming those abortions' illegality, and where the challenged statutes haven't been enforced against anyone anywhere. Tr. 148. To the extent Seyb claims to be chilled in exercising his own medical judgment, that chill is of his own making.

Seyb's standing regarding abortions to prevent self-harm is even more vaporous. In the 26 years Seyb has practiced in Idaho, he has *never once* been asked to perform an abortion for the purpose of protecting a mother from self-harm. Tr. 148–49. At trial, he recalled a tragic incident where one of his former patients committed suicide after her baby was born. Tr. 121–22. But (1) he never opined that an abortion might have prevented that outcome, and (2) the woman wanted to have her baby and stopped taking her medicine to protect her child. *Id.* Given Seyb's experience, he cannot claim that it is "certainly impending" that he will need to provide an abortion to prevent self-harm. *Lujan*, 504 U.S. at 564 n.2 (cleaned up).

One purpose of standing is to make sure "the issues presented are definite and concrete, not hypothetical or abstract." *Thomas v. Anchorage Civil Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (cleaned up). But Seyb's sprawling trial presentation addressing textbook lists of extremely rare medical conditions is the definition of hypothetical. The Court should decline to rule on his abstract dispute involving situations he is highly unlikely to ever face.

ARGUMENT

I. Seyb's Due Process Claim Is Foreclosed by Precedent and Meritless.

The Fourteenth Amendment's Due Process Clause protects unenumerated rights only to the extent that they are "objectively, deeply rooted in this Nation's history and tradition and implicit in

the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up). To "guard against the natural human tendency to confuse what that Amendment protects with [a judge's] own ardent views about the liberty that Americans should enjoy," *Dobbs*, 597 U.S. at 239, a plaintiff must provide "a careful description of the asserted fundamental liberty interest," and courts must "exercise the utmost care before breaking new ground in the area of unenumerated fundamental rights." *Khachatryan v. Blinken*, 4 F.4th 841, 856 (9th Cir. 2021) (cleaned up).

Proving a fundamental liberty interest requires more than the mere absence of historical regulation or the permissibility of a certain practice. *Dobbs*, 597 U.S. at 244, 253 ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so."). Instead, Seyb must show a "legal *right*." *Id.* at 243. The "most important historical fact" in this analysis is "how the States regulated abortion when the Fourteenth Amendment was adopted." *Id.* at 272. The analysis also examines other common law authorities, such as authoritative treatises and early case law. *Id.* at 242–46. Still, the analysis turns on "*this* Nation's history and tradition." *Id.* at 231 (emphasis added).

In assessing whether the Fourteenth Amendment protects an asserted fundamental right, all relevant facts are legislative facts. *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989) ("legislative facts" are "those applicable to the entire class of cases—rather than adjudicative facts," which are "those applicable only to the case before" the court). "Only adjudicative facts are determined in trials, and only legislative facts are relevant to the constitutionality of a challenged law." *Nathan v. Alamo Heights Indep. Sch. Dist.*, 173 F.4th 576, 608 n.57 (5th Cir. 2026) (en banc) (quoting *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012)).

Here, deciding whether the Due Process Clause enshrines Seyb's proposed fundamental

rights is straightforward: *Dobbs* says no. But even conducting the analysis afresh, the historical evidence shows there is no fundamental right to abortion in the situations Seyb proposes. Thus, Idaho's statutes are subject only to rational basis review, which they satisfy easily based on the State's interest in, among other things, protecting unborn life whenever such life may be protected.

A. *Dobbs* forecloses Seyb's claim of a fundamental right to abortion in any circumstance.

Seyb's claim is foreclosed by *Dobbs*. *Contra* Tr. 902. There, although the question presented in the petition for certiorari used the phrase "elective abortion," 597 U.S. at 234, the Court's fundamental-right analysis did not limit itself to "elective" abortions. It exhaustively surveyed the legal history of *all* abortions—including state laws allowing abortions "to save the life of the mother," *id.* at 249—and ultimately held without any qualifying adjectives "that the Constitution does not confer a *right to abortion*," and "does not prohibit the citizens of each State from *regulating* or *prohibiting abortion*." *Id.* at 292, 302 (emphases added). The Court therefore "returned to the people and their elected representatives" "the authority to regulate abortion," including by imposing "limitations upon [abortion]." *Id.* at 232 (cleaned up). The Ninth Circuit has followed suit, holding after *Dobbs* that "abortion is not a fundamental right," without any qualifying language limited to "elective" abortions. *Raidoo v. Moylan*, 75 F.4th 1115, 1125 (9th Cir. 2023).

Indeed, *Dobbs* rejected a constitutional right to an abortion "for the preservation of the life *or health* of the mother" as part of the now "overruled" *Roe* and *Casey* framework. 597 U.S. at 271, 292 (emphasis added); *see Casey*, 505 U.S. at 879 (joint op.) (allowing the states to "regulate, and even proscribe abortion" post-viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother") (cleaned up). Accepting Seyb's expansive right to a "therapeutic" abortion would return to the *Casey* understanding of life or health exceptions that *Dobbs* expressly discarded. Moreover, *Dobbs* held that "laws regulating or prohibiting abortion . . . are governed by the same standard of review as *other health and safety*

measures" (i.e., rational basis)—contradicting the notion that any subset of abortion "health and safety measures" are subject to strict scrutiny. 597 U.S. at 237 (emphasis added).

The Constitution empowers the people of Idaho to legislate to protect life by recognizing "that a human person comes into being at conception and that abortion ends an innocent life." *Dobbs*, 597 U.S. at 223–24. The Court should end its analysis here.

B. Idaho may constitutionally prohibit abortions intended to protect the mother's health.

1. Seyb has failed to clearly describe the asserted fundamental right.

As an initial matter, Seyb's claim must fail because he has not included "a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Throughout this litigation, he has pressed different descriptions of the fundamental right at issue.

In his complaint, Seyb claims a right to an abortion when "pregnancy-related complications jeopardize the [mother's] health" or "continuing the pregnancy would exacerbate an underlying health condition or interfere with the pregnant person's ability to obtain standard treatment for that condition." Dkt. 56 ¶ 125. But his proposed conclusions of law claim a right to abortion "to mitigate a risk of serious harm to [a woman's] physical or mental health." Dkt. 104 ¶ 328. And he phrases his requested relief differently still, asking to enjoin Idaho's laws "[w]hen a physician concludes, based on good-faith medical judgment and the facts known to the physician at the time that an abortion would mitigate a non-negligible risk of serious harm to a pregnant person's physical or mental health." Dkt. 104 ¶ 382.

At trial, Seyb's experts addressed a different type of right. Rather than focus on what qualifies as a "serious harm," they addressed when an abortion is "medically indicated." Even then, they cannot agree on when an abortion is "medically indicated." Tr. 34, 113, 366; *see* Tr. 1067. They would only commit to circularly defining "medically indicated" as having a "medical reason" for an abortion. Tr. 402; *see* Tr. 34.

Seyb's failure to clearly describe the fundamental right dooms his claim. A careful description is no mere pleading formality, nor only a matter of allowing the State to respond (though it is certainly that too). Rather, a careful description is essential to conduct the necessary historical inquiry with precision and to prevent the asserted right from becoming limitless. *Glucksberg*, 521 U.S. at 720–23; *see Seegmiller v. LaVerkin City*, 528 F.3d 762, 769-70 (10th Cir. 2008).

And here, there is enormous risk that Seyb's claimed right would become limitless. "[I]ndications for" abortion have "gradually expanded," Tr. 524, threatening to make "medically indicated" abortions an exception that swallows the rule. Tr. 377 (Dr. Eller testifying that "copious literature" makes "very clear … that abortion is safer than ongoing pregnancy for women"); Tr. 153 (Seyb does not consider pregnancy alone to be a medical indication for abortion "right now"). ACOG already says that *all* abortions are "medically indicated" abortions. Tr. 1067–68. Moreover, Seyb's framing of the fundamental right as resting on the subjective judgment of doctors—which would make it the *only* fundamental right contingent on a third-party's judgment—would afford physicians *carte blanche* and defy the principle that "there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926).

Rather than grapple with Seyb's varying, ambiguous descriptions of an asserted right, the Court should hold that his claim fails for lack of a careful description.

2. There is no fundamental right to an abortion to protect the mother's health.

As for the historical evidence Seyb presents—much of which (tellingly) was analyzed and deemed irrelevant by *Dobbs*—it comes nowhere near establishing a fundamental right.

No right. Seyb's claim is immediately deficient because he cannot muster a single historical source claiming a *legal right* to a health-preserving abortion. Whereas other fundamental rights have been expressly described as positive rights in historical sources, *e.g.*, *Calder v. Bull*, 3 U.S. 386, 388–95 (1798) (Chase, J.) (seriatim); *Corfield v. Coryell*, 6 F.Cas.546, 551 (E.D. Pa. 1823) (Washington,

J.), Dr. Eppinger conceded she couldn't find language calling a "therapeutic abortion" "an express right" either in "case law or in statute." Tr. 596. Dr. Cohen similarly admitted an absence of historical evidence deeming abortion a legal "right." Tr. 1006. And Seyb hasn't identified any contemporary "scholarly treatise" or "law review article[ ]" claiming such right, nor any criminal prosecution dismissed or conviction reversed based on a legal right, including based on necessity or self-defense. *Dobbs*, 597 U.S. at 241.

The absence of any source claiming a "legal *right*" to an abortion to preserve the mother's health is fatal to Seyb's claim. *Dobbs*, 597 U.S. at 243, 245 (no source "remotely suggests a positive *right* to procure an abortion at any stage of pregnancy"); *see Dep't of State v. Munoz*, 602 U.S. 899, 912 (2024) (rejecting fundamental-right claim to enter country despite historical allowance, citing James Madison's observation that history of "admi[tting] [ ] noncitizens into the country was characterized as 'of favor [and] *not of right*' "); *Reach Cmty. Dev. v. Dep't of Homeland Sec.*, 174 F.4th 1143, 1147 (9th Cir. 2026) (rejecting fundamental-right claim when "no federal or state court … recognized the Plaintiffs' claimed right" and no "scholarly treatise … support[ed] such a right").

Historically prohibited. Abortions to mitigate threats to the health of the mother have been almost universally *prohibited* unless also necessary to save the mother's life (which Idaho law allows). When the Fourteenth Amendment was ratified, nineteen states' abortion prohibitions contained exceptions when necessary to save the life of the mother, and six states' prohibitions were accompanied only by a *mens rea* requirement (like "maliciously" or "unlawfully") without an express life exception. *Dobbs*, 597 U.S. at 302–23. Only *one* state (Illinois) allowed abortion to preserve only a mother's health (with the arguable addition of Maryland, which allowed abortion to "secure the safety of the mother"). Dkt. 93 at 19 n.8. The Fourteenth Amendment's ratification did not result in a legal challenge overturning any of these laws. To the contrary, a supermajority of

states continued to criminalize "therapeutic" abortions through 1966: 42 states allowed abortions to save the life of the mother,[1] five allowed them to preserve a mother's "health" or "safety" or "to prevent serious permanent bodily injury,"[2] and three states retained a *mens rea* requirement without explicit exemptions.[3] There cannot be a fundamental right to perform an act that has historically been prohibited by a supermajority of states, and the Fourteenth Amendment's ratification did nothing to change that. *Dobbs*, 597 U.S. at 260; *Glucksberg*, 521 U.S. at 710–11.

Seyb argues that even though these statutes' clear text outlawed abortions to mitigate serious threats to the health (but not life) of the mother, the statutes were understood at the time to allow any abortions for any medical reason. Not so. Copious evidence shows that laws allowing abortions to save the mother's life were not understood to allow all abortions for medical purposes.

For starters, Illinois *did* include an exception at the time for "*bona fide* medical or surgical purposes," and the Wyoming and Colorado territories allowed for abortions to prevent "serious and permanent bodily injury." James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 45 n.49 (1985) (collecting statutes). So the citizenry in 1868 could (at least conceptually) distinguish between life-saving abortions and "therapeutic" abortions—and nearly every state opted to allow only the former. Proving that point, Illinois and Wyoming amended their statutes shortly after ratification to allow abortions only to preserve the life of the mother. Linton, *Therapeutic Abortions*, *supra*, at 17 n.64, 18 n.67.

Other state actions confirm that their life exceptions didn't allow abortions to mitigate non-life-threatening health risks. From 1967 to 1972, as states began to liberalize their abortion laws, 24

---

[1] Paul Benjamin Linton, *Therapeutic Abortions Before* Roe*: An Examination of the Language and Interpretation of Abortion Prohibitions* 7–8 (February 25, 2026), https://tinyurl.com/a5wfh6ru.

[2] Colo. Rev. Stat. § 40-2-23 (1963); N.M. Stat. § 40-3-2 (1957); Ala. Code, Tit. 14, § 9 (1958); Md. Code art. 27, § 3; 1951 Or. Laws ch. 265, § 3.

[3] 1851 Pa. Laws No. 374, § 88; Mass. Gen. Stat. ch. 165, § 9 (1860); N.J. Stat. § 2A:87-1 (1952).

states rejected bills adding an explicit health-related exemption. Paul Benjamin Linton, *Overruling* Roe v. Wade: *Lessons from the Death Penalty*, 48 Pepperdine L.R. 261, App. A (2021). These amendments would have been unnecessary if the underlying laws already allowed such abortions.

Case law interpreting exceptions allowing abortions to save the life of the mother is also overwhelmingly contrary to Seyb's position. At least 21 cases from 19 state courts interpreted such exceptions to either expressly or implicitly prohibit abortions for maternal health reasons. Linton, *Therapeutic Abortions*, *supra*, at 15 (collecting cases). Seyb has not identified *any* pre-*Dobbs* American case agreeing with his atextual interpretation. The best he can cite is the jury instructions from *Rex v. Bourne* in England in 1939—a case *Dobbs* indicated is unlikely to "shed light on the meaning of the Constitution" given its timing and foreign origin. 597 U.S. at 273.

The few state statutes that prohibited abortions with only a corresponding *mens rea* requirement and no explicit exemptions do not support a deeply rooted right to "therapeutic" abortion either. While one state court interpreted the *mens rea* requirement to allow for health-of-the-mother abortions, *Kudish v. Bd. of Registration in Med.*, 248 N.E.2d 264, 266 (Mass. 1969), two other states held that the requirements allowed for life-preserving abortions, *State v. Moretti*, 244 A.2d 499, 504 (N.J. 1968); *Commonwealth v. Bingaman*, 51 Pa. Super. 336, 342 (1912), and "there is no clear support in case law [of those states] for the proposition that abortion was lawful where the mother's life was not at risk." *Dobbs*, 597 U.S. at 249 n.35. As Professor Dellapenna explained, the *mens rea* language did not create an unwritten "therapeutic" exception; it just referred to the mental state necessary for the crime. Tr. 813.

Besides the textual implausibility, Plaintiff's interpretation of the state statutes with *mens rea* requirements would create surplusage in the eleven state statutes at the time of the Fourteenth Amendment that contained a *mens rea* requirement *and* an exception for the life of the mother.

Dobbs, 597 U.S. at 302–23 (New York, Ohio, Indiana, Iowa, Alabama, Michigan, New Hampshire, Kansas, Georgia, Rhode Island, and North Carolina). If a *mens rea* requirement already allowed abortions to preserve the health of the mother, those states would not need to provide an explicit life-preserving exemption. Tr. 813; *Yates v. United States*, 574 U.S. 528, 543 (2015) (surplusage canon).

But ultimately, any disagreement among the parties over this statutory history is a tempest in a teapot. That a handful of states may have had a health-of-the-mother exception does not prove that the Fourteenth Amendment created a fundamental right to that exception. *That* conclusion would require post-ratification cases striking down the statutes that unambiguously did *not* have health-of-the-mother exceptions. And Seyb does not identify a single one before the late 1960s.

Legislative motives. Seyb pivots and tries to impugn legislative motives, arguing that life-of-the-mother statutes were motivated merely by professional and economic protectionism, sexism, racism, or religious discrimination. This *exact* argument based on the *same* evidence—which was raised *by Seyb's expert*, Tr. 1003–04—was rejected by *Dobbs*, which noted that "[r]esort to this argument is a testament to the lack of any real historical support." 597 U.S. at 253–54. *Dobbs* held "[t]here is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being." *Id.* at 254; Tr. 814–16.

Historical practice. Seyb also seeks to evade the staggering weight of legal authority by arguing that "therapeutic" abortions occurred in practice and were not prosecuted. The record shows otherwise. Tr. 804–05, 822–23, 828–30, 904.[4] And Seyb's argument wouldn't be enough to show a *legal right* to obtain such an abortion. *Dobbs*, 597 U.S. at 243, 253 (that states may not have

[4] *E.g.*, *People v. Wellman*, 149 N.W.2d 908, 912 (Mich. Ct. App. 1967); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 903 (Ky. 1972). Elective abortions were also prosecuted during the relevant time, and hospital boards played a "leading" role in enforcing abortion laws. Tr. 817; Ex. 10 at 304–13 (describing rarity and danger of abortion), 430–438 (increase in prosecution records after 1840), 532–35 (prosecutions between 1875 and 1940), 536 (license revocations between 1930 and 1970).

criminalized some abortions "does not mean that anyone thought States lacked the authority to do so"). Moreover, the dearth of prosecutions is explainable by (1) doctors following the law, and (2) the dangerousness of abortion procedures at the time, which would have deterred doctors from risking a mother's life with an abortion unless it was unavoidable. Tr. 804–05, 828, 895, 919, 1017–19.

The only primary sources Seyb identifies for his claim that American doctors could conduct abortions for any health reason say no such thing. Rather, they confirm that whatever discretion doctors had to perform an abortion was confined to situations where the mother's life was in peril. These anecdotes and historical papers include:

- (Dkt. 104 ¶ 271) A lecture and newspaper account of Dr. Gunning Bedford in 1847, who evacuated the womb of a woman experiencing life-threatening vomiting that "resisted every remedy," whose "death [was] hourly expected," Tr. 950–53, 1038–40; App., Exs. A–B;

- (Dkt. 104 ¶ 272) Passages by Dr. Horatio Storer in 1861 in a work for doctors, affirming that "premature labor" was justified "with reluctance" for certain medical conditions—all of which threatened the life of the mother, Tr. 954–56, 1037–38; App., Ex. C;

- (Dkt. 104 ¶ 272) Passages by Dr. Storer in 1866 in a work for a public audience listing circumstances when doctors *have been known* to provide abortions, noting that abortion was only justifiable if "absolutely to save the woman's life," Tr. 957–59, 1034–37; App., Ex. D;

- (Dkt. 104 ¶ 275) An article by Dr. Robert Campbell Eve in 1894 providing a list of fatal complications where "*premature labor*, provided the object be to save the life of the mother or *child* or both" is justified, Tr. 959–61, 1032–34 (emphases added); App., Ex. E;

- (Dkt. 104 ¶ 277) An article by Dr. William Parish in 1893 stating "[w]henever it is necessary to terminate pregnancy in order to save the life of the mother, such a procedure is justifiable; if not thus necessary, the procedure is criminal," Tr. 1026–29; App., Ex. F;

- (Dkt. 104 ¶ 278) An article by Dr. Montgomery Russell in 1907 stating that abortion is only justifiable when a disease "imperils [the mother's] life, and there is a reasonable probability that she will recover if abortion occur," Tr. 973, 1025–26; App., Ex. G.

Again, these are *Seyb's* best sources. Sources he didn't select are even less favorable. In an article Seyb doesn't mention that directly follows Dr. Russell's article in the 1907 medical journal, Dr. C.N. Suttner states, "We *all* consider it a gross blunder against the science of obstetrics to

sacrifice the life of the infant unless it be the only means to save the life of the mother." Tr. 1024–25 (App., Ex. H at 305–06) (emphasis added); *see* App., Ex. I at 111 (1900) (doctor stating abortion justified only if a mother's "life is in imminent peril"); App., Ex. J at 1983 (1906) (abortion for "probable injury to health . . . is not justified by law").

Seyb also appeals to developments in England at the turn of the 20th century, discussed by John Keown. But those post-ratification foreign developments do not "shed light on the meaning of the Constitution" in 1868 and certainly not on "*our* Nation's scheme of ordered liberty." *Dobbs*, 597 U.S. at 237–38, 273 (cleaned up and emphasis added). Keown's theory that English doctors could perform health-of-the-mother abortions after 1900 also does not rest on the type of sources that support a fundamental right—he invokes "extra-judicial dicta" by lawyers contradicting statements by courts, Ex. 9 at 54, non-unanimous opinions by doctors, *id.* at 61–64, and the absence of recorded prosecutions, *id.* at 43; *but see* Tr. 809–10. Even still, Keown finds many clear statements in law and medicine prior to 1900 that abortion was justified only to save a mother's life. Ex. 9 at 52–67.

Late-19th and early-20th century writings of doctors have little to no value in a fundamental-rights analysis. *Dobbs*, 597 U.S. at 272–73 (criticizing *Roe*'s reliance on medical associations' positions); *id.* at 338 n.1 (Kavanaugh, J. concurring). And the compilation Seyb has put together *at best* shows that some doctors at the turn of the 20th century—who were required to follow state abortion laws outlawing "therapeutic" abortions—disagreed about when abortion should be justified.[5] That does not come close to establishing a deeply rooted legal right.

[5] The three post-ratification sources the Court mentioned in its summary judgment order are of similar import. Dkt. 93 at 21 n.12. One says "permanent health," but lists conditions presenting "imminent" "danger" that were life threatening. App., Ex. L at 118–19 (1872). One discusses the author's view of when abortion "in a general way" "should" be available. App., Ex. M. at 97–104 (1896). The other does not identify risks to health alone. App., Ex. N at 82 (1914).

English common law. With no pedigree in our Nation's history and tradition for health-of-the-mother abortion rights, Seyb reaches back to English common law. *But see Dobbs*, 597 U.S. at 272 ("the most important historical fact" is "how the States regulated abortion when the Fourteenth Amendment was adopted"). That history is no more helpful to his position.

None of the great common law authorities like Bracton, Hale, Coke, and Blackstone, granted immunity from criminal liability to a medical practitioner for an abortion "with therapeutic intent." Tr. 823–24, 828; *Dobbs*, 597 U.S. at 242–45. None of them even referenced "therapeutic" abortions, likely because doctors could not identify conditions where abortions would preserve "health" alone, and because such abortions (at least until the 20th century) were often ineffective and always posed a high risk of maternal death. *E.g.*, Tr. 572–73, 584–85, 776–77, 803–06, 811–12, 818–20, 1012; *see* Ex. 10 at 29–57 (discussing efficacy and safety of abortion methods); App., Ex. K at 142–44 (1845). As Dr. Eppinger conceded, no authority provided an exemption for what Seyb has defined as a "therapeutic" abortion. Tr. 596.

Instead, Seyb's expert admittedly relied on "inference," comparing separate discussions about regulation of medical practice with prohibitions on abortion. Tr. 601–02, 825. For example, she suggests there was a general right to health in the common law justifying "therapeutic" abortions based solely on treatises discussing homicide, naming Bracton's exception to manslaughter for a treatment that accidentally kills a patient. Tr. 628–29; *but see* Tr. 822–25. But multiple sources during this time emphasized that physicians must take care to avoid *any* possibility of abortion. Tr. 806, 822–23. Out of a desire "to protect the life of the child," Tr. 802; *see also* Tr. 585–86, "Hale and Blackstone treated abortionists differently from *other* physicians or surgeons who caused the death of a patient 'without any intent of doing [the patient] any bodily hurt.'" *Dobbs*, 597 U.S. at 245 (cleaned up). Those other physicians "would not be 'guilty of

murder or manslaughter,' " but an abortionist "would, precisely because his aim was an 'unlawful' one." *Id.* (cleaned up); *see also* Tr. 795–804 (discussing common law treatises).

State constitutions. The only two post-*Dobbs* courts to recognize a *state* constitutional right to some "therapeutic" abortions also don't provide the weighty historical evidence Seyb needs. The Indiana Supreme Court cited *zero* historical evidence of a right to a limited health-preserving abortion, relying instead on abstract reasoning from the state constitution's right to "life." *Members of Med. Licensing Bd. of Indiana v. Planned Parenthood Great Nw.*, 211 N.E.3d 957, 975–77 (Ind. 2023). *Dobbs* forecloses that sort of reasoning when identifying fundamental rights in the federal constitution. 597 U.S. at 257–58.

For its part, the North Dakota Supreme Court relied solely on two articles in a 20th century local medical journal that don't identify risks to health alone. *Wrigley v. Romanick*, 988 N.W.2d 231, 241 (N.D. 2023); App., Ex. N (1914), App. Ex. O (1914). Those articles cannot bear the weight of the historical inquiry *Dobbs* demands.

Self-defense and necessity. Seyb next analogizes to the common law defenses of self-defense and necessity. This fails too.

Precedent forecloses Seyb's argument by analogy. In the fundamental rights context, "general analogy to inapposite caselaw is insufficient." *Reach Cmty.*, 174 F.4th at 1147. The historical sources must "address the specific right at issue." *Id.* "One cannot simply pluck a 'right' as general and abstract as 'bodily integrity' from the caselaw, and then carefully describe that right on one's own terms without regard to whether that right is in fact grounded in history." *Id.* at 1148.

Establishing fundamental rights by analogy is particularly forbidden in the abortion context. *Dobbs* forcefully and repeatedly made this point, rejecting attempts to derive a specific right to abortion by analogy to a "broader right to autonomy" or "bodily integrity." 597 U.S. at 256–57, 295.

Because historical evidence must recognize a specific unenumerated right based on "specific historical practices," *Khachatryan*, 4 F.4th at 856 (cleaned up), the analysis from *enumerated*-right cases is inapposite. Applying enumerated rights to situations "unimaginable at the founding" may "involve reasoning by analogy" to history. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28 (2022). But the Supreme Court has refused to allow such analogies in fundamental rights claims out of concern that it will lead courts "to usurp authority that the Constitution entrusts to the people's elected representatives." *Dobbs*, 597 U.S. at 239–40 (cleaned up).[6]

Seyb has presented no historical evidence connecting health-preserving (or even life-preserving) abortions to the legal defenses of necessity or self-defense. Nobody at trial even tried to link these concepts. Instead, "inference" dominated Seyb's evidence, Tr. 602, and not even "inference" about self-defense and necessity. Moreover, while the Court has noted that abortion and self-defense were discussed in subsequent pages in Blackstone, Blackstone never connected those principles directly or outlined how self-defense would apply to a prosecution for the "very heinous misdemeanor" of abortion. Dkt. 93 at 22.[7] Given the lack of historical sources "address[ing] the specific right at issue," Seyb's claim fails. *Reach Cmty.*, 174 F.4th at 1147.[8]

---

[6] The analogical reasoning from *Bruen* would be of no help to Seyb anyway. While abortions became safer and more effective over time, the idea of an abortion to preserve a mother's health in non-life-threatening situations was not "unimaginable" to those who ratified the Fourteenth Amendment, even if they could not have known which circumstances threatened health but not life. *Bruen*, 597 U.S. at 26–28; *see supra* (listing three abortion laws mentioning "health" or something similar).

[7] Seyb also cites a law review article citing a few medical commentators who briefly connect life-saving abortion to the concept of self-preservation. Dkt. 104 ¶ 317. But those sources are (1) exclusively medical, not legal, (2) discussing state statutory law, not a common-law right or its elements, and (3) discussing life-saving abortions, not "therapeutic" abortions. App., Ex. J at 1984 (1906) (discussing "a kind of implied authorization by the state"); App., Ex. P at 1005 (1914) (discussing "[s]tatute law"); App., Ex. K at 145 (1845) (discussing the concept briefly).

[8] Seyb's brief attempts to analogize to the right of bodily integrity and the right not to be subjected to cruel and unusual punishment must fail for this same reason. Dkt. 104 ¶¶ 197–98. As *Dobbs* made clear, those rights can cannot be extrapolated to abortion because "[a]bortion destroys . . . the life of an 'unborn human being.'" 597 U.S. at 257.

There's good reason why no source connected self-defense and necessity to "therapeutic" abortions. Self-defense at common law required an attacker's unlawful force. Blackstone wrote that a person can "repel force by force" when "forcibly attacked in his person or property." 3 Blackstone ch. 1. The attack had to be a capital "crime … committed by force" that "if committed, would also be punished by death," to justify using deadly force in response. 4 Blackstone ch. 14. The current common law retains the requirement that the threatened force be "unlawful." *United States v. Biggs*, 441 F.3d 1069, 1071 (9th Cir. 2006). Of course, a child in the womb doesn't use unlawful force against the mother. The baby is innocent. George P. Fletcher, *Rethinking Criminal Law* 782, 863 (2000). That's why doctors writing about abortion always sought ways to preserve the life of the child when possible. *E.g.*, App., Ex. E at 520–21 (1894), Ex. I at 110 (1900), Ex. J at 1981 (1906).

"Therapeutic" abortions also do not require that the danger be "imminent" or that the force be "*necessary* to avert the danger," as required at common law. *Shorter v. People*, 2 N.Y. 193, 196, 201–02 (1849); *Criminal Law - Homicide - Self Defence*, 13 Harv. L. Rev. 223 (1899) (collecting cases). Rather, as Seyb describes them, "therapeutic" abortions are those that "mitigate a risk of serious harm"—even if there are alternative treatments available, *see infra* Section I.B.3, I.C.3, and even if the risk is merely "non-negligible." Dkt. 104 ¶ 382.

The defense of necessity similarly cannot establish an analogue for "therapeutic" abortion. First, the defense has historically had undefined contours, so it cannot provide a deeply rooted anchor for Seyb's fundamental right. Necessity in "the law of England was so vague that . . . judges would be practically able to lay down any rule which they considered expedient." W.H. Hitchler, *Necessity as a Defense in Criminal Cases*, 33 Dick. L. Rev. 138, 141 (1929). So while Francis Bacon believed a hungry man could steal food, Blackstone said "that the law of England admitted

of no such excuse." *Id.* Even today, necessity is "poorly developed in Anglo-American jurisprudence." *State v. Hastings*, 118 Idaho 854, 855, 801 P.2d 563, 564 (1990).

In particular, the necessity defense has not universally been understood to justify a taking of life, as abortion does. An English court famously rejected the "broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour." *Regina v. Dudley*, 14 Q.B.D. 273 (1884) (shipwrecked sailors). Some states today prohibit invoking necessity as a defense to homicide. *E.g.*, Ariz. Rev. Stat. § 13-417(C); *People v. Coffman*, 96 P.3d 30, 106 (Cal. 2004).

Second, necessity at common law (and continuing today) required that "the evil inflicted by" the act must be "not disproportionate to the evil avoided." *Chesapeake & O.R. Co. v. Com.*, 84 S.W. 566, 568 (Ky. 1905). In the famous example of two innocent shipwrecked passengers struggling for a single plank, the one who shoves the other off could invoke necessity because his own life was at stake. *Id.* But the "peril must be instant, overwhelming, leaving no alternative but to lose [one's] own life, or to take the life of another person." *United States v. Holmes*, 26 F. Cas. 360, 366 (C.C.E.D. Pa. 1842); Hitchler, *supra*, at 142 (citing Blackstone). "Therapeutic" abortions fail this proportionality test—they involve taking a life even where unnecessary to save a life.

Right to medical treatment. Seyb also cannot establish a deeply rooted right to abortion through a right to "essential medical treatment"—an argument this Court has already adjudged not to be "compelling." Dkt. 93 at 17 n.6. In addition to being foreclosed by history, this framing runs headlong into the Ninth Circuit's holding that "substantive due process rights do not extend to the choice of type of treatment." *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000); *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (there is no fundamental right to a specific medical treatment "free of the lawful exercise of government police power"). Idaho has longstanding authority to "establish and enforce

standards of conduct" regarding the medical profession, *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 449 (1954); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977), and it may properly use that authority to prohibit abortion.

3. Idaho's prohibition of "therapeutic" abortions satisfies rational-basis review and, alternatively, strict scrutiny.

Because there is no fundamental right to obtain a "therapeutic" abortion to protect a woman's health in non-life-threatening situations, Idaho's abortion laws are subject only to rational basis review. That "highly deferential" form of review asks only whether Idaho could have had "any conceivable" reason for enacting its laws. *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018).

Idaho's abortion laws advance all the legitimate state interests identified by *Dobbs*—both generally and in the specific case of pregnancies where there is "a risk of serious harm" to the mother's health. Dkt. 104 ¶ 328; *see Dobbs*, 597 U.S. at 301. By prohibiting abortions that are not necessary to save the life of the mother, Idaho law directly promotes:

- "[R]espect for and preservation of prenatal life at all stages of development";
- "[T]he mitigation of fetal pain" that would be experienced through abortions, which some evidence shows can be felt well before viability, Tr. 390–92, 1099–1102;
- "[T]he protection of maternal health and safety," by directing women towards safer treatments to manage health risks during pregnancy, *see infra*;
- "[T]he integrity of the medical profession," by requiring doctors to protect *both* of their patients (the mother and the child), Ex. 2010 at 33; Tr. 84, 154–55, 405, 680, 699, 1063–64, 1070, rather than allowing doctors to end the life of one where it is not necessary to save the life of the other, which "could [ ] undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming," *Glucksberg*, 521 U.S. at 731; *see* Tr. 1024–35 (historical sources wherein physicians denounce the ethics of performing an abortion in situations that do not threaten the life of the mother);
- "[T]he elimination of particularly gruesome and barbaric medical procedures," which can involve dismembering a live unborn child and crushing his or her skull to remove the baby from the womb, Tr. 418–23, 1093–98;

- "[T]he prevention of discrimination on the basis of race, sex, or disability," which can often accompany abortion decisions, Tr. 1138, 1140–41.

Tellingly, Seyb does not argue in his proposed conclusions of law that prohibiting health-preserving abortions fails to satisfy rational basis review. *See* Dkt. 104 ¶¶ 343–48. There's no way he could—Idaho's "[l]egislative choice is not subject to courtroom fact-finding," and may even "be based on rational speculation unsupported by evidence or empirical data." *Erotic Serv. Provider*, 880 F.3d at 457 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). Nor can he second-guess the "wisdom, fairness, or logic" of Idaho's policy. *Beach Commc'ns*, 508 U.S. at 313. Idaho's rationales are *at least* "plausible," so the "inquiry is at an end." *Id.* at 313–14 (cleaned up).

But Idaho's protections for the unborn would survive even heightened scrutiny because the laws are "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302.

Idaho has a "compelling interest[ ] in protecting unborn life." *Satanic Temple v. Labrador*, 716 F. Supp. 3d 989, 1005 (D. Idaho 2024); *see MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 771 (8th Cir. 2015) ("The evolution in the Supreme Court's jurisprudence reflects its increasing recognition of states' profound interest in protecting unborn children."). It also has a compelling interest in protecting "the integrity and ethics of the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (quoting *Glucksberg*, 521 U.S. at 731).

And Idaho's laws are narrowly tailored to promote its compelling interests. The District of Idaho has previously held as much. *Satanic Temple*, 716 F. Supp. 3d at 1005 (Idaho's abortion laws "are narrowly tailored to Idaho's compelling interests in protecting unborn life and rape victims"). There is no "le[ss] restrictive alternative" that would allow abortions to mitigate a risk of serious harm to the mother while still preserving prenatal life. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973). Life is an all-or-nothing proposition, so the only way for Idaho to accomplish

its objective is to prohibit the abortions from taking place. Idaho has determined that prenatal life should not be lost for anything less than the need to save another life.

Seyb says that Idaho law is not narrowly tailored because it accomplishes its objective "at the expense of a pregnant [woman's] life or health." Dkt. 104 ¶ 340. Not so. Tr. 734–35, 1160. There are innumerable ways to mitigate a risk of serious injury to a mother's health that do not end the life of an unborn child, and Idaho law allows doctors to pursue those treatments. For example, conditions like PPROM, diabetes, and hypertension can all be managed successfully during pregnancy without abortion. Tr. 85–86, 684–85, 700–06, 1141–51.

In fact, record evidence shows that these treatments are more effective at preserving maternal life than abortion. As Seyb's experts agree, every abortion, regardless of type, poses health risks to the mother, including infection, bleeding, damage to the surrounding organs, injury to the uterus, injury to the cervix, and death. Tr. 202–04, 1091–92, 1098–99; *see* Tr. 707–10 (Dr. Hughes testifying that he would treat women "monthly" for pain, bleeding, and other complications from abortions). It is therefore unsurprising that multiple studies show that maternal mortality rates are substantially higher after an induced abortion than after giving birth. Tr. 1083–90.[9] Seyb's contrary argument is "based on certain studies with certain methodologies that [are] inappropriate and dishonest," which "highly exaggerate the risks of continuing pregnancy versus abortion." Tr. 1071.

Data regarding maternal mortality in Idaho confirms that Idaho's approach is better for maternal health. Idaho's maternal mortality rate has declined since the Defense of Life Act became

[9] *See* Gissler et al., *Pregnancy-Associated Mortality after Birth, Spontaneous Abortion, or Induced Abortion in Finland, 1987-2000*, Am. J. Obstet. & Gynecol. 190(2) (2004), 422–27; Reardon et al., *Deaths Associated with Abortion Compared to Childbirth— a Review of New and Old Data and the Medical and Legal Implications*, J. Contemp. Health L. Pol. 20(2) (2004), 279–327; Shadigian et al., *Pregnancy-Associated Death: A Qualitative Systematic Review of Homicide and Suicide*, Obstet. & Gynecol. Survey 60(3) (2005), 183–90.

enforceable in 2022, and its rate compares favorably to other states. Using data from Idaho's Maternal Mortality Review Committee reports, Exs. 1–7, and avoiding years coinciding with the COVID-19 pandemic, Idaho's pregnancy-related mortality ratio (PRMR) has plummeted from 18.7 deaths per 100,000 live births in 2018 to 4.29 deaths in 2024. Ex. 7 at 5. With a larger sample size, the PRMR for 2018 and 2019 combined (16.11) is also higher than the PRMR for 2023 and 2024 combined (13.22). *Compare* Ex. 1, 2, 6, 7 (add pregnancy-related deaths, divide by live births, and multiply by 100,000); *see also* Tr. 1060–61. The PRMR of 13.22 is substantially lower than the PRMR for the United States. Ex. 7 at 5.

There may be rare instances where a mother faces a *significant risk* of serious harm to her health and abortion becomes *necessary* to avoid that harm. Tr. 707, 1145–49 (explaining that these instances are rare). To be clear, these instances are a small subset of the instances Seyb claims within his asserted fundamental right. Dkt. 104 ¶ 328 (claiming right whenever abortion would "mitigate a risk"), ¶ 382 ("mitigate a non-negligible risk"). But testimony at trial established that abortion will often be necessary to prevent the death of the mother in such circumstances too, so it would be legal in Idaho. Tr. 49–51, 1147, 1150, 1157–58. Take PPROM. That condition occurs in less than 1% of pregnancies and can be effectively managed through outpatient visits. Tr. 704. If infection occurs, it can lead to sepsis and kidney failure, but it is also life-threatening, so the doctor and mother may choose to end the pregnancy. Tr. 37, 705–06; Tr. 1145 (hemorrhage may justify ending pregnancy).

To the extent there are circumstances where there is a genuine threat that a mother will incur serious harm, an abortion is the only way to prevent that harm, and the mother's life is also not in peril, those circumstances are vanishingly few, if they exist at all. Dr. Kraus struggled to envision one, Tr. 1203–11, and Seyb's presentation at trial certainly did not clearly describe any. More important for strict scrutiny purposes, Seyb has not shown that there is any way Idaho could have

authorized abortions in such circumstances without also compromising its compelling interest by sacrificing thousands of prenatal lives in situations where abortion is not necessary to preserve the mother's health. In fact, Seyb has shown precisely the opposite through his myriad attempts to define the fundamental right he tries to advance—only to settle on terms like "medically indicated" and "non-negligible risk" that provide doctors free reign to perform an abortion. *See* Section I.B.1, *supra*.

C. Idaho may constitutionally prohibit abortions based on a risk of self-harm.

Seyb next seeks license to perform an abortion when it would, in his "medical judgment," "mitigate a non-negligible risk that a pregnant person will die from self-harm." Dkt. 104 ¶ 382; *contra* Idaho Code 18-622(1)(a)(i). There is no fundamental right to an abortion in those situations, and the State has ample justification for not allowing such abortions.

1. Seyb has failed to carefully describe a fundamental right to abortion for women at risk of self-harm.

As before, Seyb has failed to meet his burden to carefully describe his claimed right. Seyb claims a right to an abortion when "continuing the pregnancy would put the pregnant person at risk of death from self-harm." Dkt. 56 ¶ 125; Dkt. 104 ¶ 380. But this alleged right would allow for an abortion anytime a pregnant woman might be suicidal or otherwise be at risk of death from self-harm (including drug addicts who might overdose), regardless of whether an abortion would actually treat the mental illness or substance abuse issues (which it does not). An abortion is never necessary to treat a woman at risk of death from self-harm, as there are always other treatment options and an abortion never actually treats the underlying mental illness or substance abuse addiction. Tr. 1103, 1111, 1115–18. This is not a careful description of the alleged right.

2. There is no fundamental right to abortion to prevent self-harm.

Many of the same failures that plague Seyb's asserted right to a "therapeutic" abortion likewise doom his asserted right to an abortion based on a risk of self-harm. For starters, he cites

no case, statute, treatise, or law review article describing such abortions (or any abortion) as a "legal *right*." *Dobbs*, 597 U.S. at 241, 243. That alone is fatal to his claim.

Moreover, abortions intended to prevent suicide were widely *prohibited* during most of our Nation's history. While many states enacted statutes allowing abortions that were necessary to "preserve" or "save" the life of the mother, *Dobbs*, 597 U.S. at 302–23, those statutes were not understood as allowing abortions because a woman might commit suicide. *See* Tr. 829 (Professor Dellapenna testifying he was not aware of any mental health exception before the 20th century).

Indeed, it would be shocking if a threat of suicide *did* historically provide justification for abortion. As *Glucksberg* explained while exhaustively surveying the history showing that suicide was considered unlawful, "opposition to and condemnation of suicide [ ] are consistent and enduring themes of our philosophical, legal, and cultural heritages." 521 U.S. at 711. "More specifically, for over 700 years, the Anglo–American common-law tradition has punished or otherwise disapproved of [ ] suicide." *Id.* It defies credulity to assert that those who ratified the Fourteenth Amendment made a patient's threat to commit an act broadly viewed as "a grave public wrong" justification for a physician to perform a procedure that was also broadly viewed as wrongful. *Id.* at 714.

Case law confirms this. The Wisconsin Supreme Court held as much in 1891, concluding that an abortion performed on a woman who "had threatened to commit suicide unless she could be relieved of the child" was unlawful. *Hatchard v. State*, 48 N.W. 380, 382 (Wis. 1891). The court's reasoning was neither "ambiguous" nor intended to address only "suicidal ideation not linked to a medical diagnosis," Dkt. 104 ¶ 288—it held that it was "very manifest that the [life-of-the-mother exception] was not intended to apply to such a case, but only to a case where the death of the mother can reasonably be anticipated to result from natural causes unless the child is destroyed." *Hatchard*, 48 N.W. at 381.

Nor was this case an "outlier." Dkt. 104 ¶ 326. Later cases likewise held that a life-preserving exception did not authorize abortions for mental health reasons. In *People v. Wellman*, the trial court found that a doctor unlawfully conspired to perform an abortion on a woman who asserted she was suicidal. 149 N.W.2d 908 (Mich. Ct. App. 1967). The appellate court approvingly quoted the trial judge, who stated that it was likely "that most unmarried women" "are inclined and frequently tell their physicians that they are ready to take their own life. This does not in my opinion justify any type of abortion." *Id.* at 912. Similarly, the Illinois Supreme Court held that the state's statutory life-of-the-mother exception applied only to the "preservation of a woman's life due to physical dangers." *People ex rel. Hanrahan v. White*, 285 N.E.2d 129, 130 (Ill. 1972); *see also Austin v. State*, 194 S.W. 383, 383 (Tenn. 1917) (implying that life-preserving exception did not extend to threats of suicide).[10] Seyb does not cite any pre-*Roe* American cases reaching an opposite holding.

Statutory history is in accord. Bills to allow abortion to protect a mother's mental health were proposed and failed in 24 states between 1967 and 1972. Linton, *Overruling* Roe, *supra*, at App. A. These "repeated attempts to have the legislature engraft the concept of mental or psychiatric grounds for a legal therapeutic abortion" show that the existing statutes were "not intended to" and did "not encompass" mental health-related abortions. *Hanrahan*, 285 N.E.2d at 131. "Otherwise, such revisions or amendments would have been unnecessary." *Id.*

Given all this, it is unsurprising that Seyb's expert admitted she is unaware of *any* abortions to prevent suicide occurring before 1900. Tr. 590–91. *Accord* Ex. 9 at 66 ("a threat of suicide was

[10] *See also Adkins v. State of Idaho*, 2025 WL 1148465, at *16 (Idaho Dist. Ct. Apr. 11, 2025) (noting "the absence of evidence that [Idaho's] territorial-era exception [for life-preserving abortions] was understood to apply" to threats of self-harm, and "its language hardly suggests it applies"). North Dakota and Indiana's state abortion rights also exclude abortions to prevent self-harm. *Access Indep. Health Servs., Inc. v. Wrigley*, 28 N.W.3d 850, 851, 853, 892 (N.D. 2025); *Planned Parenthood Great Nw. v. Members of Med. Licensing Bd. of Indiana*, 267 N.E.3d 494, 508–09 (Ind. Ct. App. 2025).

regarded as insufficient" to justify abortion in England— "the appropriate course was to place her under observation or restraint").

Seyb resorts again to the post-ratification remarks of medical professionals, but these sources weaken his claim. Most of the quotes Seyb provides lack context—one is actually about induced labor, one discusses situations where others have provided abortion (without opining on lawfulness), and one concludes that an abortion performed "for apprehended insanity" was probably "criminal[ ]."[11] Dkt. 104 ¶¶ 272, 275, 277. And doctors during the same time period disagreed with the opinions that Seyb has collected. *E.g.*, App., Ex. J at 1983 (1906) ("Fear of suicide . . . does not justify the performance of [abortion]"); *Austin*, 194 S.W. at 383 (describing testimony by doctor that he knew an abortion for suicidality was unlawful).

Seyb also attacks the distinction between physical conditions that threaten a woman's life and mental conditions that prompt a woman to harm herself, arguing that the latter is just as involuntary as the former. Tr. 68; *but see Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality) (rejecting the argument that addiction renders action legally "involuntary"). That argument fails to consider other justifications for distinguishing between the two types of threats, like the ability to verify the threat's legitimacy or the alternatives to prevent the harm. But in any event, it is irrelevant whether the distinction between those two types of threats is defensible based on modern science. The fact that the law historically drew the distinction defeats the claim of a fundamental right. *Khachatryan*, 4 F.4th at 856 (rights inquiry requires "central reference to specific historical practices") (cleaned up).

In sum, early American history and jurisprudence on abortion and suicide overwhelmingly weigh against the fundamental right Seyb proposes. That right cannot be inferred by analogy to

[11] In order: App., Ex. E at 520–21 (1894) (describing "abortion" as a practice that would "preserv[e] [ ] the life of the mother or child, or both"); App., Ex. D at 21–25 (1866); Tr. 1030 (quoting App., Ex. F at 154–55 (1893)).

self-defense or necessity either. Fundamental rights can never be inferred by analogy. And it "has been long accepted" that self-defense doesn't apply to a "self-generated necessity to kill," and neither defense is available when there are reasonable alternatives to deadly force (as there are when treating a mother with suicidal ideation, *see* Tr. 288–89, 1115–18). *United States v. Peterson*, 483 F.2d 1222, 1229, 1231 (D.C. Cir. 1973) (cleaned up).

3. Idaho's self-harm exception satisfies rational basis review and strict scrutiny.

Thus, prohibiting abortions to prevent self-harm is subject only to rational-basis review, which it satisfies based on Idaho's objective of preserving prenatal life. *Dobbs*, 597 U.S. at 300–01. Indeed, even under strict scrutiny, Idaho has a compelling interest in this objective, *see* Section I.B.3, *supra*, and prohibiting abortions to prevent self-harm is narrowly tailored to that objective.

Idaho has presented significant evidence that abortion is not a treatment for mental health conditions. The risk of suicide actually *decreases* while a woman is pregnant—suicide is less common during pregnancy than at any other time in a woman's life. Tr. 87–88, 1112. An abortion transitions a woman from that low-suicide-risk condition to a higher risk-of-suicide state (post-partum). Tr. 1114–15. And even when a woman who receives an abortion does not experience symptoms of post-partum depression, research shows that abortion still increases the risk of suicide. Tr. 305–06; 309–11; 1103–08; Gissler, *supra*, at 422–27. Thus, Idaho has a "strong basis in evidence" to determine that abortions do not alleviate any risk of self-harm, and that maternal health would be better promoted without such procedures. *Bush v. Vera*, 517 U.S. 952, 977 (1996).

Moreover, there are always alternative treatments for mental health conditions that do not take the life of the unborn child, such as medication (which can be altered as needed), therapy, counseling, and, if necessary, in-patient hospitalization, where a woman can be observed and safeguarded around the clock. Tr. 288–90, 686–92, 1115–18. With these alternatives, abortion is not a necessary treatment for a mental health condition. Tr. 1118. Even Seyb's expert psychiatrist

testified that in 23 years of treating hundreds of patients with mental health conditions, she has only *discussed* abortion as a possible treatment *four times* and has never performed one. Tr. 298. And Seyb has never been asked to perform an abortion to prevent a mother from harming herself, Tr. 148–49, disproving his merits claim and his standing.

And while abortion is never (or, by Seyb's account, almost never) appropriate to treat mental health conditions, it is frequently invoked as justification for abortion in practice. This is likely due to the difficulty for doctors (both psychiatrists and others who treat pregnant women, Tr. 287) and potential prosecuting authorities to verify true threats of self-harm. Tr. 1108–12 (no way to objectively diagnose risk of self-harm). In the United Kingdom, which allows abortions in some circumstances, the mother's mental health is cited to justify hundreds of thousands of abortions per year. *Abortion Statistics, England and Wales: 2022*, GOV.UK (Jan. 25, 2026), https://tinyurl.com/ytv5pyhk. (98% of abortions (247,440) were performed for health reasons, and "[t]he vast majority (99.9%)" of those "were reported as being performed because of a risk to the woman's mental health"). Before *Roe*, California saw similar results. Russell et al., *Therapeutic Abortions in California: First Year's Experience under new Legislation*, 101 Am. J. Obstetrics & Gynecology 757 (1969) (in the first year after the 1967 statute permitted mental health abortions, "more than 88[%] of the [5,000] abortions were done under the mental health portion of the law"). The limitless formulation of Seyb's requested relief—turning on the physician's judgment and requiring only a "non-negligible risk"—does nothing to assuage those concerns. Dkt. 104 ¶ 382.

Thus, even if strict scrutiny applied, Idaho could not have used less restrictive means to protect prenatal life. To the extent abortion is ever necessary to prevent self-harm (it's not), there would be no way to craft a statute that would identify those rare (at best) cases without opening the flood gates and unnecessarily sacrificing thousands of prenatal lives. Idaho was therefore justified in

choosing to prohibit abortions that attempt to treat self-harm, thereby protecting unborn lives while channeling women towards effective mental health treatments. *See* Tr. 90–92 (Idaho had only 13 pregnancy-related deaths from 2018 to 2024 due to mental health conditions—compared to over 155,000 live births, *see* Exs. 1–7—which is fewer than the deaths due to physical health conditions).

D. Idaho may constitutionally prohibit aborting children with "life-limiting conditions."

Although Seyb did not argue at summary judgment that there is a fundamental right to abort unborn children with "life-limiting embryonic and fetal conditions," he briefly asserts as much in his proposed conclusions of law. Dkt. 104 ¶ 332. But Idaho's choice not to allow eugenic abortions is subject only to rational basis review, which it easily satisfies.

1. Seyb has failed to carefully describe the alleged right.

Seyb has come nowhere close to giving a "careful description" of the eugenics right he claims. *Glucksburg*, 521 U.S. at 721 (cleaned up). It is unclear whether the asserted right includes only conditions that are likely to lead to the child's *death*, or also those that merely render a child *disabled.* Although Seyb's complaint, the summary judgment briefing, and much of the testimony at trial centered around "fatal" or "lethal" fetal conditions, Dkt. 56 ¶ 126, Dkt. 83 at 32–33; Tr. 172–77; Tr. 366, Seyb also describes the right as guaranteeing the ability to abort even children who could sustain life with "severe morbidity" after birth. Dkt. 104 ¶ 68; *see also* Tr. 171–72 (Dr. Dahl reciting the ACOG definition of "life-limiting condition," which includes those who would live with "severe morbidity or extremely poor quality of life"). In either case, Seyb never explains how severe the morbidity must be, how poor the quality of life must be, or how "short[]" a child's life must be expected to last to fall within the claimed right. Tr. 432. In fact, Seyb presented conflicting testimony on that score. Tr. 402 (Dr. Eller: "a couple months"); Tr. 114 (Seyb: "a few years of life"); Tr. 193 (Dr. Dahl: "there is no time limit" because "we can't predict [lifespan] with a hundred percent

certainty"). Seyb's expert also disclaimed any ability "to provide an exhaustive list" of conditions that fall within the fundamental right. Tr. 172. So there is no fixed "right" to adjudicate.

2. There is no fundamental right to abort children with "life-limiting conditions."

Regardless, there is no historical pedigree for any fundamental right to abortion based on the expected quality or duration of the child's life. As Professor Dellapenna explained, until 1967, no state statute allowed abortions for fetal anomalies, which generally were not detectable until well into the 20th century anyway. Tr. 571, 813–14; Ex. 10 at 91–94, 99–108 (explaining that unlawful infanticide was used to kill children instead), 754–56 (discussing genetic testing and associated abortion). And from 1967 to 1972, 25 states *rejected* adding an explicit exemption for the child's serious health issues—proving that their laws did not already allow abortions in such situations, and that they did not view such laws as necessary to protect fundamental rights. Linton, *Overruling* Roe, *supra*, at App. A.

Seyb, on the other hand, has provided *no* evidence of this fundamental right. Dr. Eppinger gave no testimony related to life-limiting fetal conditions. Dr. Cohen briefly opined that some hospital committees in the 1960s allowed abortions based on "fetal indications," but she admitted that she "ha[d]n't done th[e] research" and "ha[d] no knowledge of how that would have worked." Tr. 999–1002. This is no foundation on which to establish a fundamental right.

Seyb also seeks to extrapolate a fundamental right to a historically prohibited practice by reasoning from abstract rights to health and life (but not self-defense, for obvious reasons). Dkt. 104 ¶ 332. As previously explained, that type of reasoning is not allowed for fundamental rights, especially in the abortion context. *See* Section I.B.2, *supra*. And it fails in any event. Even assuming the views or practices of doctors could establish a fundamental right over contrary state law, Seyb has not put forth *any* evidence that 19th-century doctors—who had no way of detecting

"life-limiting conditions," could not perform abortions safely, and shared a "unanimous" regard for "the sanctity of fetal life"—performed lawful abortions on healthy mothers. Tr. 773–77, 1036.

3. Idaho has a rational basis to ban aborting children with life-limiting conditions.

Idaho has several rational bases for refusing to allow abortions of children with "life-limiting conditions," any one of which is sufficient to sustain the law. *Beach Commc'ns.*, 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it") (cleaned up). These bases would even pass strict scrutiny.

First, Idaho's policy choice promotes "respect for and preservation of prenatal life." *Dobbs*, 597 U.S. at 301. Idaho esteems all life as having worth, "from beginning to end, regardless of physical or mental condition." *Glucksberg*, 521 U.S. at 729; *see also* Idaho Code § 18-8802(1). Moreover, fetal diagnoses can be incorrect, as can estimates of how long a child will live after birth. Tr. 193–94; Tr. 1122 (prenatal diagnoses of congenital heart defects and neurologic conditions are wrong 8–9% of the time). Idaho seeks to "protect[ ] prenatal fetal life . . . where there is *some* chance of survival outside the womb" and as long as the life of the mother is not threatened. *Planned Parenthood Great Nw. v. State*, 171 Idaho 374, 445, 522 P.3d 1132, 1203 (2023).

Seyb callously questions "[w]hat is the point?" in allowing these children to live for what may be a brief amount of time, Tr. 132, while one of his experts views such short lives as not "meaningful." Tr. 194. But Idaho has rationally decided that no one should be able to decide that another's life is not meaningful. *Glucksberg*, 521 U.S. at 729–30 ("States may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, . . . even for those who are near death") (cleaned up); *see* Tr. 194 (Dr. Dahl agreeing that there is no "standard definition of what's a meaningful life"); Tr. 438 (Dr. Eller disavowing any ability to judge "what is a meaningful life"). And Dr. Hughes movingly illustrated the impact these brief lives can have in any event. While the child's death is obviously "very difficult," the few hours a family spends

with the baby and the respectful ceremony following death can be "a wonderful event" that promotes "bond[ing]" and "meaning." Tr. 695–97; *see also* Tr. 1137–38.

Seyb may prefer that Idaho allow each person the ability to choose for themselves what constitutes a meaningful life worth protecting. Tr. 194, 437–38. But that's a policy argument that must be directed to the "political process" after *Dobbs*. 597 U.S. at 228. As this Court recognized during trial, the value of a life is a question of "ethics," Tr. 432–33, and the people of the State are empowered to decide that "moral question" and protect the unborn who cannot protect themselves. *Dobbs*, 597 U.S. at 257.

Second, Idaho has an interest in preventing "discrimination on the basis of . . . disability." *Dobbs*, 597 U.S. at 301; *see also Roberts v. Jaycees*, 468 U.S. 609, 623 (1984) (state has a "compelling interest in eradicating discrimination"). That's exactly what aborting a child with a "life-limiting condition" is—a determination that life with a disability has no value. Tr. 1138.

Third, Idaho has an interest in the "preservation of the integrity of the medical profession" and eliminating "particularly gruesome or barbaric medical procedures." *Dobbs*, 597 U.S. at 301. Unlike abortions performed to save a mother's life (or even to preserve her health), aborting children with "life-limiting conditions" engages doctors in the work of death without any reciprocal restorative aim. Like assisted-suicide, such abortions "could [ ] undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming." *Glucksberg*, 521 U.S. at 731 (cleaned up). Such abortions also frequently involve "gruesome" and "barbaric" procedures that dismember a living baby in the womb. Tr. 1096–98.

E. Idaho has a rational basis to prohibit "multifetal pregnancy reduction" abortions.

Finally, without invoking any concept of fundamental rights, Seyb argues that Idaho lacks a rational basis to prohibit so-called "multifetal pregnancy reduction" abortions—intentionally

ending one or more unborn child's life based on speculation about increasing the potential lifespan of other children in a multi-child pregnancy (twins, triplets, etc.). Once again, Seyb is wrong.[12]

Under rational basis review, Idaho can appropriately rely on medical evidence that multi-fetal pregnancy reductions are not "necessary" because of "how excellent our neonatal care is." Tr. 1140; *Beach Commc'ns*, 508 U.S. at 313 (statute must be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis"). Even Seyb's expert recognized the legitimacy of that position with respect to triplets. Tr. 386; *accord* Tr. 1140 (Dr. Kraus testifying that "there's evidence that reducing trichorionic triplets to twins doesn't actually change survivability of the remaining babies"). Dr. Kraus explained that an adequate alternative to reduction is "continuing the pregnancy as it is and providing ongoing [ ] care and evaluation for [ ] all the pregnancies." Tr. 1141.

Moreover, Idaho's refusal to permit multifetal pregnancy reduction furthers Idaho's interest in the "prevention of discrimination on the basis of . . . sex[ ] or disability." *Dobbs*, 597 U.S. at 301. As Dr. Kraus explained, multifetal pregnancy reductions often involve selecting which child's life to terminate based on "fetal sex" or "genetic[s]." Tr. 1140–41.

Prohibiting multifetal pregnancy reduction also promotes "respect for and preservation of prenatal life at all stages of development." *Dobbs*, 597 U.S. at 301. All parties agree that projecting whether a child will survive in the womb and after birth requires forecasting probabilities—nothing is certain. Tr. 193–94, 386–88. Seyb presents multifetal pregnancy reduction as a cold mathematical exercise: allegedly, it is a choice between a lower probability of quadruplets surviving (for example),

[12] At one point, Seyb frames these abortions as ones that "would give one or more embryos or fetuses a meaningful chance of survival when they would otherwise have *none*." Dkt. 104 ¶ 345 (emphasis added). But at trial and in his requested relief, Seyb exclusively discusses children with *some* chance of survival, where aborting another child would allegedly *increase* that chance. Tr. 134–37, 386; Dkt. 104 ¶ 382.

and a higher probability of one or two babies surviving. Tr. 134, 386. But the latter of those options involves a *100% chance* of intentionally ending the life of two unborn children.

Whether it is legal and moral to take life to increase the chances that another will survive is the kind of question ethicists have debated for centuries. *E.g.*, *Holmes*, 26 F. Cas. at 368. (sacrificing passengers on sinking boat). And, again, it's the type of "moral question" Idaho can decide for itself after *Dobbs*, 597 U.S. at 257.

II. Seyb's Equal Protection Claim is Duplicative and Meritless.

Seyb separately argues that Idaho law violates the Equal Protection Clause because it prohibits abortion based on a risk of self-harm but allows it for other harms. This claim is duplicative of his Due Process claim regarding abortions to prevent self-harm, and fails for the same reasons. "[I]f a law neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *United States v. Skrmetti*, 605 U.S. 495, 509–10 (2025). As the Court has noted, Seyb doesn't claim a suspect class. Dkt. 93 at 24; *see Cleburne*, 473 U.S. at 446 (mentally ill not quasi-suspect class). And there is no fundamental right to an abortion for mental health reasons. *See* Section I.C.2, *supra*. So Idaho's law is subject to rational basis review, which it passes for the reasons above. *See* Section I.C.3, *supra*.

CONCLUSION

The Court should hold that Seyb lacks standing. Alternatively, it should hold that Idaho's abortion laws are constitutional. And to the extent the Court incorrectly decides to create a right to abortion rejected by *Dobbs*, history, and tradition, no relief should be granted against the Attorney General, Dkt. 130, or in favor of anyone other than Seyb, *Trump v. CASA, Inc.*, 606 U.S. 831, 856 (2025).

DATED: June 30, 2026

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

Attorney for Defendants Members of the Idaho Board of Medicine and Intervenor Attorney General Raúl Labrador

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on June 30, 2026 the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

Jamila Johnson
jjohnson@lawyeringproject.org

Tanya Pellegrini
tpellegrini@lawyeringproject.org

Paige Suelzle
psuelzle@lawyeringproject.org

Stephanie Toti
stoti@lawyeringproject.org

Wendy S. Heipt
wheipt@legalvoice.org

Ronelle Tshiela
Rtshiela@lawyeringproject.org

Joy Williams
jwilliams@lawyeringproject.org

Kelly O'Neill
koneill@legalvoice.org

Attorneys for Plaintiff

Dayton Reed
dreed@adacounty.id.gov
civilpafiles@adacounty.id.gov

Attorney for Ada County Prosecuting Attorney

/s/ *James E. M. Craig*
JAMES E. M. CRAIG