Nos. 26-5360, 26-5558

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STACY SEYB, M.D.,

Plaintiff-Appellee,

v.

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

Defendants,

and

RAÚL LABRADOR,

Intervenor-Defendant-Appellant.

STACY SEYB, M.D.,

Plaintiff-Appellee,

v.

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

Defendants,

and

ADA COUNTY PROSECUTING ATTORNEY, Jan Bennetts, in her official capacity,

Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Idaho
Hon. B. Lynn Winmill
Case No. 1:24-cv-00244-BLW

APPELLEE'S CONSOLIDATED RESPONSE TO APPELLANTS' EMERGENCY MOTIONS FOR A STAY OF INJUNCTIVE RELIEF PENDING APPEAL

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INTRODUCTION

The injunction entered by the district court is narrowly tailored to protect pregnant people in Idaho from dying or suffering serious injury from preventable causes. It is grounded not in a broad right to abortion, but rather, in a narrow right to self-preservation in cases where continued pregnancy would pose a risk of death or serious and lasting harm to the pregnant person's health. The Attorney General and Ada County Prosecuting Attorney (the "State") are simply wrong that the Constitution grants the Idaho legislature the power to condemn certain members of society to death or serious injury by popular vote. The Constitution instead reserves the fundamental rights of life and health to the people.

Dobbs did not say otherwise. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Although the Supreme Court held that the Constitution does not confer a "broad right" to pre-viability abortion in all circumstances, it did not address whether the Due Process Clause of the Fourteenth Amendment confers a right to abortion for the purpose of preserving a pregnant person's life or health. *Id.* at 225, 231; *see id.* at 234 (noting that the Court granted certiorari "to resolve the question whether 'all pre-viability prohibitions on elective abortions are unconstitutional'"); *id.* at 380 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The majority does not say … whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical

treatment."). The district court here answered that question based on a thorough examination of the relevant historical record, including testimony presented by expert witnesses during a six-day trial.

The record shows that our legal tradition has long assigned primacy to the rights of life and health, recognizing that the two are not only of paramount importance in our scheme of ordered liberty, but they are inextricably intertwined. Blackstone described life and health as essential components of the "right of personal security," which he characterized as one of the "absolute rights of every Englishman." 1 William Blackstone, *Commentaries on the Laws of England* 127–29 (1765). The Second, Fifth, Eighth, and Fourteenth Amendments all embody protections that are firmly grounded in the recognition of these fundamental rights, ranging from the right to bear arms for self-defense, *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008); to the prohibition on deprivation of life without due process of law, U.S. Const. amend. V, *id.* amend. XIV, §1; to the requirement that states and the federal government tend to the serious medical needs of those in their custody, *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 636 (9th Cir. 2021); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1122–23 (9th Cir. 2018).

The law's historic treatment of abortion reflects an understanding that the fundamental rights of life and health encompass therapeutic abortion. The

common law distinguished between abortions performed for the purpose of "curing a woman of disease" and abortions performed for "unlawful" reasons, maintaining that the former could not serve as the basis for criminal liability. *Infra* 18. In both England and the U.S., nineteenth-century statutes criminalizing abortion exempted medically indicated abortions from liability through either mens rea requirements incompatible with therapeutic intent or express therapeutic exceptions. *Infra* 18–24.

English scholar John Keown, whose work is repeatedly cited in *Dobbs*, conducted an extensive review of obstetrical textbooks published in England between 1794 and 1937, as well as medical journal articles, lectures, and proceedings of medical conferences. 2-SER-144–61; *Dobbs*, 597 U.S. at 243, 244, 247 n.32, 248, 252 n.38. He concluded that therapeutic abortions were performed for a wide array of medical indications during this time period, including the preservation of mental health. 2-SER-148–49. The American medical literature shows that the same was true on this side of the Atlantic. *Infra* 24–25. Medical schools taught students how to perform therapeutic abortions safely; the procedures were performed openly; and many prominent doctors wrote and lectured about their personal experiences providing such care. *Infra* 24–25. None were convicted of a crime. *Infra* 25.

Importantly, the fundamental rights of life and health do not extend to prenatal life. The historical record demonstrates unequivocally that embryos and

fetuses were not considered persons when the Fifth and Fourteenth Amendments were adopted. *Infra* 15–18. At common law, a fetus was not deemed a rational creature *in rerum natura* (in existence) until it was born and took its first independent breath. *Infra* 15. For that reason, a fetus could not be the victim of homicide and was not owed any duties in tort. *Infra* 15–17. In the U.S., this common law tradition extended well into the twentieth century. *Infra* 15–17. Likewise, pre-*Roe* statutes criminalizing abortion did not equate fetal death with the death of a person. *Infra* 17.

The State fails to meaningfully engage with the historical record, preferring to mischaracterize the evidence and district court's reasoning rather than confront them head on. For that reason and others, it fails to make a substantial case for relief on the merits. Further, the balance of hardships tips sharply in favor of the Idaho residents at risk of death or serious and lasting injury from continued pregnancy. Accordingly, the Court should deny the motions for a stay.

STATEMENT OF FACTS

Some pregnant people are at heightened risk of serious injury or death, either because of complications that develop during the pregnancy or because of underlying conditions that are complicated by the pregnancy. ER-14–17.

Among other things, pregnancy can trigger the onset of mental illness, and it can also exacerbate existing mental illness, in some cases leading to treatment

resistance. ER-19. These complications are likely due to the hormonal changes associated with pregnancy. ER-19. Further, pregnant people often stop taking psychiatric medications to avoid fetal exposure. ER-19. Certain mental health conditions, such as bipolar disorder, major depressive disorder, psychotic disorders, and substance use disorder, are associated with a substantially increased risk of death from self-harm. ER-18. Idaho's maternal mortality review committee ("MMRC") determined that mental health conditions were the most frequent underlying cause of pregnancy-related death in Idaho from 2018 to 2024.[1] ER-17. Mental health conditions are also a leading cause of pregnancy-related death nationwide. 3-SER-285–86. For some pregnant people with mental health disorders, abortion is the most effective means of preventing death by self-harm. ER-20.

[1] In its 2023 report, the MMRC explained that: "Idaho's 2023 Pregnancy-Related Death (PRD) findings highlight that women with pre-existing health conditions have a higher risk of dying during pregnancy and for a year after childbirth …. Three (3) of the five (5) Pregnancy-Related Deaths had a mental health condition as a pre-existing condition." ER-216. The following year, while this lawsuit was pending, the MMRC changed its methodology and is no longer classifying deaths from suicide as pregnancy-related when the decedent had a prior history of suicidal ideation or attempts. ER-232. This change in methodology is out-of-step with national standards, ignores that pregnancy exacerbates the risk of suicide for people with a prior history of mental illness, and appears calculated to cover up the State's actual incidence of pregnancy-related death from suicide. 3-SER-258–60, 281–82.

Additionally, the MMRC concedes that "[t]he 2024 MMRC findings are statistically insignificant," ER-224, which means that they do not support the State's claim that Idaho's "maternal mortality rates have plummeted" since its abortion bans took effect, Appellants' First Mot. ("Mot.-1") at 4.

Pregnancy complications can also cause severe, nonfatal physical injuries, such as kidney failure, other permanent organ damage, blindness, and loss of future fertility. ER-14–16. Additionally, pregnancy can delay or prevent cancer treatment, render a patient ineligible for organ transplant, and exacerbate latent cardiac issues. ER-17.

As relevant here, Idaho's Defense of Life Act prohibits abortion in cases where continued pregnancy poses a risk of death from self-harm, as well as in cases where continued pregnancy poses a risk of serious and lasting nonfatal injury. Idaho Code § 18-622. A separate Idaho statute, the Fetal Heartbeat Preborn Child Protection Act, independently prohibits abortion when embryonic or fetal cardiac activity is detectable unless the pregnant person is experiencing a "medical emergency" that necessitates an "immediate abortion." Idaho Code §§ 18-8801(5), 18-8804(1).[2]

The plaintiff, Dr. Stacy Seyb, is a board-certified maternal-fetal medicine specialist ("MFM") who has worked for St. Luke's health system in Idaho for more than twenty-five years. ER-23. As an MFM, Dr. Seyb exclusively treats patients with high-risk pregnancies. ER-23. His patients typically have wanted pregnancies, and most carry to term. 3-SER-264, 273–75. Occasionally, patients

[2] Although the Fetal Heartbeat Preborn Child Protection Act cannot be enforced through criminal penalties while the Defense of Life Act is in effect, it can be enforced through civil actions. Idaho Code §§ 18-8805(4), 18-8807.

diagnosed with serious medical conditions decide to end their pregnancies, and Dr. Seyb provides them abortion care. ER-24. He filed this case to challenge the constitutionality of Idaho's abortion bans as applied to patients with high-risk pregnancies. ER-3.

On August 13, 2026, following a six-day bench trial, the district court entered Findings of Fact, Conclusions of Law, and Order. ER-1–81. The court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to life- and health-preserving abortions. ER-5, 39–72. It further held that, insofar as they prohibit constitutionally protected abortions, Idaho's abortion bans are not narrowly tailored to serve a compelling state interest. ER-5, 72–74. In addition, the court held that Idaho's differential treatment of pregnant people with life-threatening mental health conditions and pregnant people with other life-threatening medical conditions violates the Equal Protection Clause. ER-5, 74–77.

It entered an injunction barring the Attorney General, who voluntarily intervened in this lawsuit, 2-SER-96, and Ada County Prosecuting Attorney from enforcing Idaho's abortion bans in two circumstances:

(1) "where a physician has determined, in his or her good faith medical judgment, that continuation of the pregnancy poses a non-negligible risk of serious and lasting harm to the health of the pregnant woman"; and

(2) "where a physician has determined, in his or her good faith medical judgment, that abortion is necessary to prevent a non-negligible risk that continuation of the pregnancy will result in the death of the pregnant woman from self-harm."

ER-80.[3] The injunction does not apply to Idaho's forty-three other county prosecuting attorneys, whom the district court dismissed from the case on Article III standing grounds. 2-SER-117–19.

On August 25, 2026, on motion from the Attorney General, the district court stayed the injunction to the extent it prohibits the Attorney General and Ada County Prosecuting Attorney from enforcing the challenged statutes "against persons other than Dr. Seyb." 1-SER-7.

The district court has not yet entered final judgment, and a motion by Dr. Seyb asking that court to rule on his request for declaratory relief remains pending.

LEGAL STANDARD

"A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). A stay should not be issued unless the following factors

[3] The "non-negligible risk" language comes from a state-court limiting construction of the Defense of Life Act. ER-31, 2-SER-66.

weigh in its favor: (1) "whether the stay applicant has made a strong showing that he is likely to succeed on the merits"; (2) "whether the applicant will be irreparably injured absent a stay"; (3) "whether issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Id.* at 434 (citation omitted). The first two factors are the most critical, and courts should address the last two factors only if the applicant has satisfied the first two. *Washington v. U.S. Dep't of Educ.*, 167 F.4th 1241, 1245 (9th Cir. 2026) (per curiam). To satisfy the first factor, an applicant "must show, at a minimum, that she has a substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (per curiam). "The party requesting a stay bears the burden of showing that the circumstances justify [its entry]." *Nken*, 556 U.S. at 433–34; *accord Washington*, 167 F.4th at 1245.

"A district court's findings of fact after a bench trial are reviewed for clear error." *Montana v. Talen Mont., LLC*, 130 F.4th 675, 686 (9th Cir. 2025); *accord Yu v. Idaho State Univ.*, 15 F.4th 1236, 1241 (9th Cir. 2021); Fed. R. Civ. P. 52(a)(6). Legal conclusions are reviewed de novo. *Montana*, 130 F.4th at 686. "[A] reviewing court should try to break [a mixed question of law and fact] into its separate factual and legal parts, reviewing each according to the appropriate legal standard." *Id.* (citation omitted). "But when a question can be reduced no further,

… 'the standard of review for a mixed question all depends[] on whether answering it entails primarily legal or factual work.'" *Id.* (citation omitted).

Contrary to the State's argument, there is no exception to Rule 52(a)(6) for constitutional cases. Mot.-1 at 6–7. This Court's decision in *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1244 (9th Cir. 1989), concerning the parameters of administrative searches, is inapposite, and the decisions in *Nathan v. Alamo Heights Independent School District*, 173 F.4th 576, 608 n.57 (5th Cir. 2026) (*en banc*), and *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), are neither controlling nor persuasive. They graft onto Federal Rule of Evidence 201(a)'s discussion of legislative facts more than it can rightly bear. *See* F.R.E. 201(a) & advisory committee's note to 1972 proposed rules; *see generally United States v. Hemani*, 146 S. Ct. 1677, 1687 (2026) ("We decide cases 'based on the historical record' and arguments 'compiled by the parties' before us." (citation omitted)); *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1, 25 n.6 (2022) ("The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That 'legal inquiry is a refined subset' of a broader 'historical inquiry,' and it relies on 'various evidentiary principles and default rules' to resolve uncertainties. For example, "[i]n our adversarial system of adjudication, we follow the principle of

party presentation.' Courts are thus entitled to decide a case based on the historical record compiled by the parties." (citations omitted)).

ARGUMENT

I. The State Fails to Make a Substantial Case That Dr. Seyb Lacks Standing to Assert His Patients' Constitutional Rights

It is well-settled that a plaintiff has "standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth v. Seldin*, 422 U.S. 490, 510 (1975); *accord Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Abortion providers have third-party standing to assert the rights of their patients in cases challenging abortion restrictions. *Isaacson v. Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013). Accordingly, the State fails to make a substantial case that Dr. Seyb lacks standing to assert his patients' constitutional rights.

II. The State Fails to Make a Substantial Case That Pregnant People Lack a Fundamental Right to Life- and Health-Preserving Abortion Care

A. The Right to Life and the Right to Health Are Deeply Rooted

The Due Process Clause of the Fourteenth Amendment, like the Due Process Clause of the Fifth Amendment, expressly protects the right to life. U.S. Const. amend. V, *id.* amend. XIV, § 1. There can be no doubt that the right to life is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Dobbs*, 597 U.S. at 231 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Given the relationship between health and longevity, our legal tradition has long recognized that the rights to life and health are intertwined. According to Blackstone, "[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." 1 Blackstone at 129. "Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them." *Id.* at 130. "Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member." *Id.* at 134. The right likewise encompasses the "preservation of a man's health from such practices as may prejudice or annoy it." *Id.*

Other aspects of our legal tradition confirm the deeply rooted nature of the rights to life and health, including the corollary rights of self-defense and bodily integrity and the governmental obligation to provide medical care to people in governmental custody. The Supreme Court has held that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). Further, it is "the *central component*" of the Second Amendment right to bear arms. *Id.* (quoting *District of*

Columbia v. Heller, 554 U.S. 570, 599 (2008)). Today, every state allows use of deadly force against threats of death or serious bodily injury to oneself or a third party. Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. Legal Analysis 37, 49–53 (2015). The State is wrong that, at common law, self-defense required an attacker's unlawful force. Mot.-1 at 18. The common law recognized varying applications of the self-defense doctrine depending on the circumstances. *See generally* 4 William Blackstone, *Commentaries on the Laws of England* 183-86 (1769). For example, Blackstone reports that it excused legal liability for drowning a fellow shipwreck victim—who engaged in no wrongful conduct—if the plank that would serve as a life raft was only big enough for one. 4 Blackstone at 186; *see also United States v. Holmes*, 26 F. Cas. 360, 366 (C.C.E.D. Pa. 1842) (jury charge) ("[S]uppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would either commit a crime in saving his own life in a struggle for the only means of safety."). Because the right to self-defense is derivative of the rights to life and health, its essence is the prerogative to engage in acts of self-preservation, not acts of vigilantism.

The importance historically ascribed to the right of bodily integrity confirms that our legal tradition attributes great value to the sanctity and well-being of a

person's body independent of the value it attributes to a person's life. As the Supreme Court explained in the nineteenth century, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

Consistent with the fundamental rights of life and health, the Eighth Amendment requires that the government "provide medical care for those whom it is punishing by incarceration." *Estelle*, 429 U.S. at 103. Deliberate indifference to the "serious medical needs of prisoners" violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 104. The Due Process Clauses of the Fifth and Fourteenth Amendments similarly require the government to provide medical care to individuals who are in governmental custody for reasons other than a criminal conviction. *See Fraihat*, 16 F.4th at 635–36; *Gordon*, 888 F.3d at 1122–23. This implies a corresponding governmental obligation to avoid undue interference in access to medical care. If the government could prohibit the general public from obtaining care for serious medical needs, it would not have a constitutional duty to provide such care to those in its custody.

B. These Rights Do Not Extend to Prenatal Life

From at least the sixteenth century onward, the common law expressly and consistently held that a fetus is not a person. Sir William Staunford, one of the best-known writers on criminal pleadings in sixteenth-century England, reported that a child *in utero* could not be the victim of homicide because it is not *in rerum natura*, or in existence. 3-SER-334–36; *In Rerum Natura*, Black's Law Dictionary (12th ed. 2024). Coke, Hale, and Blackstone all subsequently reported the same. Edward Coke, *The Third Part of the Institutes of the Laws England Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* 50 (1644); 1 Matthew Hale, *The History of the Pleas of the Crown* 433 (1736); 4 Blackstone at 197–98.

American courts in the nineteenth and early twentieth centuries likewise held that a fetus was not a person under the common law, nor under state statutes incorporating common law principles. For example, in an 1876 criminal case, the Iowa Supreme Court reversed the conviction of a physician for manslaughter in connection with the death of a fetus during childbirth. *State v. Winthrop*, 43 Iowa 519, 523 (Iowa 1876). The court held that an instruction given to the jury was faulty because it failed to make clear that, for the elements of the crime to be satisfied, the child must have been born alive before it died, establishing independent circulation and an existence separate from its mother. *Id.* at 519–23.

A line of civil cases beginning with *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884) (Holmes, J.), held that neither a fetus nor its representative could recover in tort for prenatal injuries or wrongful death *even if* the fetus were born alive. *See, e.g.*, *Magnolia Coca Cola Bottling Co. v. Jordan*, 78 S.W.2d 944, 950 (Tex. Comm'n App. 1935); *Stanford v. St. Louis-S.F. Ry. Co.*, 108 So. 566, 566 (Ala. 1926) ("The authorities … are unanimous in holding that a prenatal injury affords no basis for an action in damages …."); *Drobner v. Peters*, 133 N.E. 567, 568 (N.Y. 1921); *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 159 N.W. 916, 917 (Wis. 1916); *Buel v. United Rys. Co. of St. Louis*, 154 S.W. 71, 72–73 (Mo. 1913); *Gorman v. Budlong*, 49 A. 704, 707 (R.I. 1901); *Allaire v. St. Luke's Hosp.*, 76 Ill. App. 441, 450 (1898); *Dietrich*, 138 Mass. at 15.[4] Many of these cases distinguished doctrines concerning prenatal property rights, which are rooted in civil rather than common law, on the ground that they embody a legal fiction. *See, e.g.*, *Jordan*, 78 S.W.2d at 948 ("The decisions which protect unborn children in property and property rights but undertake by the indulgence of a fiction of existence to save to the child property which in fairness belongs to it. They do not support the imposition of liability upon others for torts indirectly committed against a prospective human being, one unseen and unknown, and who

[4] Although today, most American jurisdictions allow recovery for prenatal torts, the law did not begin to change in this respect until after World War II. *See* American Law of Torts § 9:27 (2025).

may never have an independent existence."). A Queen's Bench decision from Ireland in 1890, cited by many of the American cases, likewise denied recovery to a plaintiff for prenatal injuries. *Walker v. Great N. Ry. Co. of Ir.*, 28 L.R. Ir. 60, 69 (1890); *see id.* at 80 (Harrison, J.) ("When the accident occurred … the plaintiff was still unborn, and had no existence apart from her mother …."); *id.* at 83 (O'Brien, J.) ("There is no person and no duty."); *id.* at 84 (Johnson, J.) ("As a matter of fact, when the act of negligence occurred the plaintiff was not *in esse*, was not a person, or a passenger, or a human being."); 2-SER-68–88.

When, in 1850, the Pennsylvania Supreme Court became the first American court to hold that abortion was a common law crime throughout pregnancy, it explained that abortion was a crime against nature, and not the murder of a living child. *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850). Further, as Professor Dellapenna explained: "[T]he 19th century abortion statutes never treated abortion as the equivalent of murder. Either fetuses were not seen as fully human, or the sanctity-of-life ethic was never as fully accepted as its proponents claim …." 3-SER-325.

In sum, the law's rejection of prenatal personhood is deeply rooted in American history and tradition, spanning a period of more than four centuries. This means that the original public meaning of the term "person" as used in the Fifth and Fourteenth Amendments did not encompass prenatal life, and unlike

pregnant women, developing embryos and fetuses were not guaranteed a right to life or health by those constitutional provisions.

C. The Right to Life- and Health-Preserving Abortion Care is a Particular Application of the Deeply Rooted Rights to Life and Health

The law's historic treatment of abortion reflects an understanding that the right to therapeutic abortion is a specific application of the fundamental rights of life and health. The common law distinguished between abortions performed for the purpose of "curing a woman of disease" and abortions performed for "unlawful" reasons, imposing criminal liability only on the latter (and only in certain circumstances). 1 Hale at 429–30; *see* Monica E. Eppinger, *The Health Exception*, 17 Geo. J. Gender & L. 665, 692–93 (2016). The mens rea elements *unlawful* and *malicious* were terms of art at common law; both signified an act done without justification. 3-SER-292; 4 Blackstone at 194–95, 200.

Lord Ellenborough's Act, adopted in 1803, was the first English statute to regulate abortion. 43 George 3 c. 58 (U.K.) (1803). It criminalized abortion throughout pregnancy, but only when done "wilfuly and maliciously" or "wilfuly, maliciously, and unlawfully." *Id.* Thus, like the common law, the statute recognized that some abortions were legally justified and could not serve as the basis for liability. The mens rea elements were retained in subsequent revisions of the statute throughout the nineteenth century. 3-SER-291–93. For example, sections 58 and 59 of the Offenses Against the Person Act of 1861 provide that, to

be punishable, an abortion or attempted abortion at any stage of pregnancy must be done "unlawfully." 24 & 25 Vict. C. 100 §§ 58-59 (U.K.) (1861).

Dr. Keown's scholarship establishes that, during the nineteenth and early twentieth centuries, both the legal and medical communities in England understood therapeutic abortion to be protected by law. 2-SER-144–61. He explained that, during this period: "[T]herapeutic abortion to preserve the woman's life was lawful. The evidence suggests that the preservation of health would also have constituted a lawful cause, and there is no evidence that health was confined to the patient's physical as opposed to her mental condition." 2-SER-148. Dr. Keown could find no evidence of a prosecution for therapeutic abortion prior to 1938, 2-SER-159, and he concluded that the lack of prosecutions in the face of the open and common practice of therapeutic abortion is evidence that the legal authorities understood it to be lawful, 2-SER-162. Dr. Keown also reviewed court decisions, transcripts of legal proceedings, formal legal correspondence, and extra-judicial statements in lectures and public meetings. 2-SER-146–49. He concluded that the law afforded physicians broad discretion to provide abortions that they believed were medically indicated. 2-SER-162.

The landmark English case *Rex v. Bourne*, (1938) 3 All E.R. 615 (Eng.), [1939] 1 K.B. 687 (Macnaghten, J.), 2-SER-89–95, confirms that Lord Ellenborough's Act and its successors codified common-law immunity for life-

and health-preserving abortions. It concerns a physician charged with unlawful abortion under the Offences Against the Person Act of 1861 in connection with providing an abortion to a fourteen-year-old girl who had been raped. 3-SER-311. The reported opinion is comprised of the judge's instructions to the jury, who ultimately acquitted the doctor. 3-SER-311–12. The judge explained that, although the statute did not contain any express exceptions, use of the term "unlawful" implied an exception for acts "done in good faith for the purpose only of preserving the life of the mother." *Bourne*, 3 All E.R. at 617. The judge further instructed the jury that there is not a firm boundary between preserving a person's life and preserving a person's health. *Id.* He explained that, if continuing the pregnancy would cause serious harm to the pregnant person's physical or mental health, the implied exception is satisfied. *Id.* at 619 ("[I]f the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman."). The judge also instructed the jury to take the risk of suicidal ideation into account. *Id.* at 619–20.

Thus, *Bourne* established that the abortion ban enacted by Parliament in 1861 contained an implied exception for abortions provided in good faith to

preserve the life or physical or mental health of the pregnant person, including to mitigate the risk of suicide. Dr. Keown concluded that *Bourne* did not change the law but simply confirmed what the law had always been. 2-SER-159.

The State misrepresents *Dobbs*' discussion of *Bourne*. Mot.-1 at 14. What *Dobbs* says is that, in *Roe v. Wade*, 410 U.S. 113, 137-38 (1973), the Supreme Court "did not explain why [*Bourne* and a British abortion law enacted in 1967] shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country." 597 U.S. at 273. The record here, in contrast, makes *Bourne*'s relevance manifest: It demonstrates that *Bourne* drew on a legal tradition dating back to the common law of treating therapeutic abortions as immune from liability, *supra* 18–21; nineteenth-century American doctors were generally aware of the practices of the English medical community, sometimes apprenticed in the U.K., and had ready access to the medical literature published there, 3-SER-343-44; and some nineteenth-century American abortion statutes adopted the mens rea elements derived from English common law that were analyzed in *Bourne*, ER-51–52, 2-

SER-12–16, 17, 23.[5] Further, the district court hewed closely to the legal tradition described in *Bourne* in crafting the injunction at issue here. ER-80.

In the U.S., all of the state and territorial abortion statutes in effect in 1868, as well as those enacted between 1869 and 1938, authorized therapeutic abortions either through mens rea requirements that served to exclude therapeutic abortions or express therapeutic exceptions. ER-47–49, 2-SER-10–27. Most of the statutes with express therapeutic exceptions exempted abortion from criminal liability when "necessary to preserve the pregnant woman's life," although many of these merely required two physicians to advise that an abortion was necessary for this purpose. 2-SER-10–27. Some had different formulations, such as an Illinois statute that exempted from liability "any person who procures or attempts to procure the miscarriage of any pregnant woman for bona fide medical or surgical purposes," 2-SER-18, and a Colorado statute that exempted from liability abortions "procured or attempted by or under the advice of a physician or surgeon, with

[5] For example, Massachusetts' 1845 abortion statute criminalized abortions that were "malicious[]" and "without lawful justification." 2-SER-12. In *Commonwealth v. Wood*, 77 Mass. 85, 86-87 (1858), a physician was charged with violating it. *Wood*, 77 Mass. at 86-87. At trial, the judge instructed the jury "that if the defendant, a practising physician, in the exercise of his best skill and judgment, honestly believed that the act was necessary to preserve the mother from great peril to life or health, and in good faith procured a miscarriage with that view, he could not be convicted." *Id.* at 90. On appeal, the Massachusetts Supreme Court held that the jury instructions were proper. *Id.* at 92–93. Subsequent decisions of the Massachusetts Supreme Court confirm this understanding of the law. *See, e.g.*, *Commonwealth v. Wheeler*, 53 N.E.2d 4, 5 & n.1 (Mass. 1944) (citing *Rex v. Bourne*); *Commonwealth v. Nason*, 148 N.E. 110, 112 (Mass. 1925); *Commonwealth v. Brown*, 121 Mass. 69, 76 (1876).

intent to save the life of such woman, or to prevent serious and permanent bodily injury to her," 2-SER-24. None of these statutes distinguished self-harm from other threats to a pregnant person's life or health. 2-SER-10–27.

The State contends that the nineteenth-century statutes expressly authorizing life-preserving abortions, as well as those prohibiting "unlawful" or "malicious" abortions, intended to prohibit abortions for serious and lasting nonfatal injuries, Mot.-1 at 12–15, Appellants' Second Mot. ("Mot.-2") at 5, but the record does not support this. Indeed, the record shows that neither medical practice nor enforcement patterns varied among states based on the specific formulations of their therapeutic exceptions or mens rea requirements. *Infra* 24–25. Moreover, contemporaneous court decisions treated life and health as a continuum, rather than as discrete concepts. ER-50–55. Additionally, nineteenth-century usage of the term "necessary" supports a broad reading of statutory language immunizing abortions "necessary to preserve life" to encompass all abortions performed in cases of serious medical need, and not just those strictly required to avoid death. *See M'Culloch v. Maryland*, 17 U.S. 316, 413–14 (1819) (explaining that the word "necessary" in the Constitution's Necessary and Proper Clause, does not require "absolute physical necessity," but instead requires a reasonable fit between means and ends) ("If reference be had to [use of the word necessary] in the common affairs of the world, or in approved authors, we find that it frequently imports no

more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.").

That is certainly how the American medical community understood state laws governing abortion during the nineteenth and early twentieth centuries. ER-58–60. Medical schools taught students how to provide therapeutic abortions safely. 3-SER-365–66, 383–85. Doctors openly wrote and lectured about performing therapeutic abortions for a wide range of health-preserving reasons. 3-SER-348–83. For example, a prominent New York physician taught students that anything threatening "to destroy the life or intellect, or to permanently ruin the health of a patient," is an indication for abortion, 3-SER-362, and he described many circumstances in which he performed therapeutic abortions in his practice, 3-SER-363–65. Dr. Horatio Storer, widely regarded as the leader of the nineteenth-century anti-abortion movement, 2-SER-165–66, 3-SER-313–14, cited "general ill-health, where there is perhaps a chance of a patient becoming an invalid for life," as a lawful basis for providing an abortion, 3-SER-358–59. Storer also advocated the use of a uterine probe to treat amenorrhea (lack of menstruation) despite admitting that, on multiple occasions, his use of the probe inadvertently caused patients to miscarry. 3-SER-390–92.

Other doctors staunchly opposed to abortion lamented the broad authority the law afforded physicians to provide therapeutic abortions. 3-SER-371–74. In 1952, a pair of physicians who believed that "[t]herapeutic abortion is legalized murder," Roy J. Heffernan & William A. Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 Linacre Q. 11, 25 (1952), https://epublications.marquette.edu/lnq/vol19/iss1/5/, reported that:

> Twenty-five or thirty years ago, therapeutic abortions were performed with deplorable frequency in most of the leading non-Catholic clinics. Tuberculosis, heart disease, diabetes, hyperemesis gravidarum, neoplasms, chronic nephritis, hypertension, various types of anemia, chorea, thyroid disfunction, disturbances of the nervous system and psychiatric disorders, in fact in almost any complication of early pregnancy which did not promptly respond to conservative therapy, evacuation of the uterus would be considered.

Id. at 11. Thus, although these doctors deplored therapeutic abortion, they understood the practice to be "legalized" and widespread in the early decades of the twentieth century. *Id.* at 11, 25. Notably, as in England, despite the open and widespread practice of providing health-preserving abortions, no American doctor was convicted of a crime for doing so before World War II. 3-SER-317, 332.

In sum, the record establishes that, in the decades immediately preceding and following the ratification of the Fourteenth Amendment, life- and health-preserving abortions enjoyed broad legal protection in both England and the U.S. Before serving as an expert witness for the State, Professor Dellapenna readily acknowledged that both life- and health-preserving abortions were permitted

during this period. 3-SER-341 ("In summary, the 19th century was a period of considerable legislative activity designed to make clear that abortion, by any means at any stage of pregnancy for any reason, except to preserve the *life or health* of the mother, was a serious crime." (emphasis added)); 2-SER-167 ("At the end of World War II, abortion generally was illegal across the planet …. In almost every nation, abortion was allowed only to protect the *life or health* of the mother." (emphasis added)).

D. People Battling Life-Threatening Mental Illness Have a Right to Life-Preserving Abortion Care

The right to therapeutic abortion, and the right to life from which it derives, would mean little if they could not be asserted to protect a pregnant person from the leading cause of pregnancy-related death in Idaho.[6] *Supra* 5. The record shows that, in both England and the U.S., nineteenth- and early-twentieth-century doctors provided therapeutic abortions for mental health reasons, and they were not prosecuted for it. 2-SER-149, 3-SER-359–61, 370–71, *Wrigley v. Romanick*, 988 N.W.2d 231, 241 (N.D. 2023) (citing a 1914 medical journal article that included in a list of cases "in which an abortion is imperative: the mentally unfit who might become deranged"); *see also Bourne*, 3 All E.R. at 619–20. As this Court

[6] The State makes a multitude of factual claims about abortion and mental health that are contrary to the district court's findings. Mot.-1 at 19–20, Mot.-2 at 6. But it fails to establish that those findings are clearly erroneous. *Supra* 9.

recognized in the Eighth Amendment context, "[a] heightened suicide risk … is a serious medical need." *Conn v. City of Reno*, 572 F.3d 1047, 1055 (9th Cir. 2009), *vacated and remanded*, 563 U.S. 915 (2011), *reinstated in relevant part by* 658 F.3d 897 (9th Cir. 2011); *see also Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994).

The State's reliance on *Glucksberg* is misplaced. There, the Supreme Court recognized that "suicide is a serious public health problem." 521 U.S. at 730 ("Those who attempt suicide … often suffer from depression or other mental disorders"); *id.* (citing evidence that "more than 95% of those who commit suicide had a major psychiatric illness at the time of death"). It further explained that states have an interest in protecting vulnerable groups at risk of suicide from prejudice and societal indifference, *id.* at 732, and ensuring that they have access to treatment, *id.* at 730 ("The State has an interest in preventing suicide … and treating its causes."). Here, Idaho is claiming an inconsistent set of interests—promoting prejudice against pregnant people with mental illness; demonstrating indifference to their medical needs; and preventing them from accessing life-saving care. *Glucksberg* provides no support. Further, the State's assertion that, historically, suicide was considered a grave public wrong, Mot.-1 at 20, ignores the historic distinction between suicidal acts by those who are sane and suicidal acts by

those who are mentally ill. *See Glucksberg*, 521 U.S. at 712–13 (discussing a colonial Rhode Island law that the Court viewed as representative).

The State's reliance on *Hatchard v. State*, 48 N.W. 380, 382 (Wis. 1891), and *Austin v. State*, 194 S.W. 383, 383 (Tenn. 1917), is likewise misplaced. In those cases, there was no evidence that either patient's threat of suicide was the result of mental illness, and no doctor appeared to believe that either patient faced a credible risk of death from self-harm. In *Hatchard*, the doctor who performed the abortion did not offer a therapeutic defense. 48 N.W. at 381–82. In *Austin*, credible evidence established that the defendant, who was acquitted, did not attempt an abortion at all. 194 S.W. at 383.

Contrary to the State's argument, the campaign to liberalize state abortion laws in the 1960s and 70s tells us nothing about how those laws were understood in the nineteenth and early twentieth centuries. Mot.-1 at 21. The record demonstrates that the politics and practice of abortion began to change after World War II. 3-SER-317–18, 398–402. Therapeutic abortion moved into hospitals, which are risk averse by nature, and it became more contested by abortion opponents, leading to increased political pressure on law enforcement officials to bring test cases. 3-SER-317–18, 398–402. An article cited by the State describes an incident in 1966 in which "[n]ine respected San Francisco obstetrician-gynecologists were charged by the State Board of Medical Examiners with

unprofessional conduct for having performed hospital-approved therapeutic abortions," noting that it was "the first time that any action had been taken in California against reputable physicians who had performed termination of pregnancy in accredited hospitals." Keith P. Russel & Edwin W. Jackson, *Therapeutic abortions in California*, 101 Am. J. Obstetrics & Gynecology 757, 758 (1969), Mot.-1 at 11 (citing ER 112). Incidents like this disrupted settled understandings of the law and became catalysts for legal action across the country.

Finally, the State's contention that abortion to mitigate the risk of death from self-harm is akin to abortion on demand is both unsupported and irrelevant to the constitutional analysis. The U.K. and pre-*Roe* California data on which the State relies are inapposite. The mental health ground (Ground C) in the U.K. statute referenced by the State, Mot.-1 at 11 (citing ER 112), is far broader than the injunction issued in this case. *Abortion statistics, England and Wales: 2022*, GOV.UK (Jan. 15, 2026), https://tinyurl.com/ytv5pyhk. Other grounds for abortion permitted by the U.K. statute—namely "[t]hat the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated" (Ground A), and "[t]hat the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman" (Ground B)—are far more comparable and utilized rarely. *Id.* And unlike the injunction here, the 1967 California legislation required neither a risk of death

nor lasting harm as a condition of obtaining an abortion on mental health grounds. *People v. Belous*, 458 P.2d 194, 197 n.2 (Cal. 1969). Notably, the injunction retains the good-faith element of the Defense of Life Act's life exception. ER-80. As the Idaho Supreme Court explained, a prosecutor may establish that an abortion provider failed to act in good faith "by pointing to other medical experts on whether the abortion was, in their expert opinion, medically necessary." *Planned Parenthood Great Nw., Hawaii, Alaska, Ind., Ky. v. State*, 522 P.3d 1132, 1204 (Idaho 2023).

More importantly, the practical effects of the recognition or rejection of an asserted fundamental right are irrelevant to the constitutional analysis applied in *Dobbs*. 597 U.S. at 239. What matters is "the history and tradition that map the essential components of our Nation's concept of ordered liberty." *Id.* at 240.[7]

[7] The State criticizes the district court for not providing "an 'exhaustive' list of medical issues it thought justified abortion," Mot.-1 at 10; *accord* Mot.-2 at 4, but the statutes themselves do not endeavor to provide such a list, Idaho Code §§ 18-622(2)(a)(i), 18-8801(5), *Planned Parenthood*, 522 P.3d at 1203 ("[T]he statute uses broad language to allow for the 'clinical judgment that physicians are routinely called upon to make for proper treatment of their patients.'" (citation omitted)). The Supreme Court, "mindful that [federal courts'] constitutional mandate and institutional competence are limited," has repeatedly cautioned that federal courts should "restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (quoting *Virginia v. Am. Booksellers Assn., Inc.*, 484 U.S. 383, 397 (1988)).

III. The State Fails to Make a Substantial Case That Idaho May Discriminate Against Pregnant People with Life-Threatening Mental Illness

Because Idaho's denial of life-saving abortion care to pregnant people suffering from mental illness burdens their fundamental right to life, it is subject to strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under that standard, the burden shifts to the State to show that the law is narrowly tailored to serve a compelling interest. *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1163 (9th Cir. 2022). The State has failed to show that the Defense of Life Act's categorical prohibition of abortion for people facing a risk of death from self-harm is narrowly tailored. *See* ER-74–77. Less restrictive alternatives to a categorical prohibition are possible, such as requiring doctors to document their basis for concluding that a patient is at risk of death from a psychiatric illness, or requiring that two qualified doctors concur in the diagnosis. Accordingly, the State fails to make a substantial case that it will prevail on Dr. Seyb's equal protection claim.

IV. The State Fails to Satisfy the Other Stay Factors

The balance of equities decidedly favors denying the stay motion because the prospective harm to Dr. Seyb's patients far outweighs the State's interest in enforcing the abortion bans against Dr. Seyb in the limited circumstances covered by the injunction. Because the State "cannot suffer harm from an injunction that merely ends an unlawful practice," denying the State's stay request does not harm

the State. *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023) (holding that the government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations"); *see also Imperial Sovereign Ct. of the State of Mont. v. Knudsen*, 170 F.4th 820, 876 (9th Cir. 2026) (holding that it is "always in the public interest to prevent the violation of a party's constitutional rights"). On the other hand, a stay would put affected patients at risk of serious and lasting injury or death. ER-14–20.

CONCLUSION

For the reasons set forth above, the Court should deny the motions to stay.

Dated: September 8, 2026

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CERTIFICATE OF COMPLIANCE

I certify that:

This document complies with the Court's September 3, 2026, Order because it contains 7,789 words, excluding the items exempted by Fed. R. App. P. 32(f).

This response complies with the type size and typeface requirements of Fed. R. App. 32(a)(5) and (6).

Dated: September 8, 2026

/s/ Stephanie Toti
Stephanie Toti

CERTIFICATE OF SERVICE

I hereby certify that, on September 8, 2026, I electronically filed the foregoing response with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit using the appellate ACMS system. I further certify that all participants in the case are registered ACMS users, and that service will be accomplished by the ACMS system.

/s/ Stephanie Toti
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