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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ANNA ALMERICO, CHELSEA GAONA-LINCOLN, MICAELA AKASHA DE LOYOLA-CARKIN, and HANNAH SHARP,

Plaintiffs,

v.

LAWRENCE DENNEY, as Idaho Secretary of State in his official capacity, LAWRENCE WASDEN, as Idaho Attorney General in his official capacity, and RUSSELL BARRON, as Director of the Idaho Department of Health and Welfare in his official capacity,

Defendants.

Case No. 1:18-CV-00239-EJL

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Dkt. 17)

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I. Introduction

This case is about the fundamental right of competent adults to dominion over their own bodies, and to direct the course of their own medical treatment in the event they become unable to consent to or decline such treatment. There is no principled, constitutional basis for denying this right to pregnant people, yet § 39-4510 of Idaho's Medical Consent and Natural Death Act (hereinafter "the Pregnancy Exclusion") does exactly that.

Defendants' motion to dismiss, perhaps in recognition of the breathtaking scope of the Pregnancy Exclusion, does not seek to defend it in all circumstances. Rather, Defendants essentially concede that the Pregnancy Exclusion is unconstitutional in the case of people whose pregnancies are pre-viability. Instead, Defendants urge this Court to dismiss this case based on the mistaken assertion that the state interest in potential life recognized in *Roe v. Wade*, 410 U.S. 113 (1973), is sufficiently compelling to override the right of people whose pregnancies are viable to be free from forced intrusions into their bodily integrity. But *Roe* says no such thing.

Defendants misapprehend the nature of the rights at stake, ignore an entire body of law that supports Plaintiffs' claims, and essentially ask this Court to rewrite the challenged legislation in a bid to save it. But because the fundamental rights to bodily integrity and equality do not wane at any point during pregnancy, there is no set of circumstances under which the Pregnancy Exclusion is constitutional. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Accordingly, this Court should deny Defendants' motion.

II. Background

Courts have long grappled with the proper standards for determining whether a previously competent patient would consent to or decline medical treatment. *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990). The proliferation of state advance directives

statutes was, in part, a response to widely publicized legal battles where the patient's desires were in dispute. *See Washington v. Glucksberg*, 521 U.S. 702, 716 (1997). Idaho joined these states when it passed the Medical Consent and Natural Death Act (the "Act"). 2005 Idaho Sess. Laws 380–96 (codified at I.C. §§ 39-4501 to 39-4515). To "provide certainty and clarity in the law of medical consent," I.C. § 39-4501(1)(b), and further the "fundamental right of competent persons to control the decisions relating to the rendering of their medical care," I.C. § 39-4509(1), the Act empowers people to execute a health care directive. I.C. § 39-4510. Through this mechanism, a person can specify when life-sustaining procedures should be used, withheld, or withdrawn if the individual becomes incapacitated. *Id.*

"[Advance directive] statutes are intended to provide a firm legal basis for the issuance by competent persons of instructions about medical decisionmaking in the event that they later lose the capacity to make such decisions contemporaneously."[1] Without an advance directive, there must be an inquiry into what the patient would have wanted, which burdens the patient's family and the healthcare system, and may require recourse through the judicial system.[2]

Although the Act purports to advance the right to direct one's own medical care, it eliminates that right for pregnant Idahoans. Specifically, the Act requires that all health care directives be drafted in accordance with a model form that includes the following language: "If I have been diagnosed as pregnant, this Directive shall have no force during the course of my pregnancy." I.C. § 39-4510. Moreover, with no statutory authority whatsoever, Defendants further declare that "[l]ife-sustaining measures will continue regardless of any directive to the

[1] Meisel, et. al, *Right To Die: The Law of End-of-Life Decisionmaking* §7.01, at 7-7 (3rd ed. Supp. 2011).

[2] *Id*. at 7-18 ("Another purpose of advance directives is to avoid some of the more serious procedural problems associated with making decisions for patients who lack decisionmaking capacity, primarily by forestalling recourse to the judicial process.").

contrary until the pregnancy is complete." Compl. for Declaratory and Injunctive Relief ¶ 27–30. Even without Defendants' extraordinary assertion that all pregnant people will be forced to receive medical treatment regardless of consent, the Pregnancy Exclusion is unconstitutional.

III. The Defendants' Motion to Dismiss Must Be Denied Because There Is No Set of Circumstances Where the Pregnancy Exclusion is Constitutional

Defendants cite *Salerno,* 481 U.S. at 745, to support their claim that in order to prevail on a facial challenge, Plaintiffs must show that the Pregnancy Exclusion would be unconstitutional in every circumstance. Defendants then argue that Plaintiffs cannot make this showing, citing *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), for the erroneous proposition that the Pregnancy Exclusion is constitutional as applied to invalidate the health care directive of a patient pregnant with a viable fetus.

As an initial matter, the Pregnancy Exclusion does not mention viability, but simply nullifies the advance directives of all pregnant people. There is no indication that the Idaho Legislature intended to narrow the Pregnancy Exclusion as Defendants suggest, and because it did not, it would upend the concept of judicial review to allow such a blatantly unconstitutional statute to persist merely because Defendants suggest a hypothetical circumstance in which it could survive constitutional scrutiny.

Indeed, this is why the *Salerno* test has been subject to heated debate in the Supreme Court,[3] and remains a matter of dispute. *See United States v. Stevens*, 559 U.S. 460 (2010); *Planned Parenthood of S. Az. v. Lawall*, 180 F.3d 1022, 1025 (9th Cir.), *opinion amended on*

[3] *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (plurality opinion) (Stevens, J., Souter, J., and Ginsburg, J.) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court...."); *Glucksberg*, 521 U.S. at 740 (Stevens, J. concurring) ("I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here.").

denial of reh'g, 193 F.3d 1042 (9th Cir. 1999). As one court noted in declining to apply the *Salerno* test to an Eighth Amendment claim that the risk of executing the innocent renders the Federal Death Penalty Act ("FDPA") unconstitutional:

> That standard would require that the statute be upheld unless it would be unconstitutional as applied to everyone. Thus, under the Salerno dicta the FDPA would be constitutional if 99 times out of 100 it resulted in the execution of an innocent individual because there would be one case in which a guilty person would be executed. However, a statute that resulted in the execution of actually innocent individuals in 99% of all cases undoubtedly would be deemed to impose cruel and unusual punishment.

United States v. Sampson, 275 F. Supp. 2d 49, 58 (D. Mass. 2003).

And, in *Casey* itself, the Supreme Court declined to apply the *Salerno* "no set of circumstances" test. Instead, the Court held that an abortion law is unconstitutional on its face if, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895. Defendants cannot have it both ways. If the constitutionality of the Pregnancy Exclusion is contingent on the viability of the pregnant person's fetus, then the "large fraction" standard of review for facial challenges from *Casey* should apply.

Even under the *Salerno* standard, Defendants' argument fails. The Pregnancy Exclusion does not concern abortion rights, but the right to be free of forced intrusions by the state into one's bodily integrity.[4] This right endures throughout pregnancy. *See In re A.C.*, 573 A. 2d 1235, 1244 (D.C. App. 1990) (reversing a trial court's ruling granting doctors' petition to perform a cesarean section on a terminally ill patient who was 26 weeks pregnant against the patient's

[4] Moreover, the Pregnancy Exclusion is much broader than that as it invalidates the entire advance directive, including the designation of a healthcare agent and any other medical decisions set forth therein.

wishes). Thus, the Pregnancy Exclusion is unconstitutional even in the circumstance where it invalidates the health care directive of a person whose pregnancy is post-viability.

IV. The Pregnancy Exclusion Violates the Due Process Clause of the Fourteenth Amendment.

A. The Due Process Clause of the Fourteenth Amendment Guarantees to Every Person the Right to Bodily Integrity and to Direct Their Medical Treatment.

The Fourteenth Amendment provides that no State shall "deprive any person of . . . liberty . . . without due process of law." U.S. Const. amend. XIV, §1. At the foundation of this liberty interest lies the right to freedom over the control of one's own body. *Cruzan*, 497 U.S. 261 (holding that every individual has a constitutional right to terminate treatment). "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." *Id*. at 287-88, (O'Connor, J. concurring); *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891) ("No 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[.]"); *see also Riggins v. Nevada*, 504 U.S. 127 (1992) (holding that forcing antipsychotic drugs on an incarcerated person is impermissible under the due process clause); *Johnson v. Meltzer*, 134 F.3d 1393, 1397 (9th Cir. 1998) (reversing an award of summary judgment in favor of defendants, doctors and police officers, in plaintiff's action against defendants for the administration of an experimental drug without his consent. "[I]t is well established that a person's liberty interest in bodily integrity is one of the personal rights accorded substantive protection under the Due Process Clause."); *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014) (recognizing a right to refuse unwanted medical treatment, including life-sustaining measures).

This core principle – the right to control over one's own body – dates back to early Anglo-American law. *Cruzan*, 497 U.S. at 305 (Brennan, J., dissenting). That this right to personal autonomy includes the right to consent to or decline medical treatment is "securely grounded in the earliest common law." *Id.*; *see, e.g.*, *Mills v. Rogers*, 457 U.S. 291, 294 n. 4 (1982) ("[T]he right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician"). Correspondingly, the liberty interest protected by the due process clause of the Fourteenth Amendment includes the right of competent adults to be free from unwanted medical interventions, which "necessarily involve[] some form of restraint and intrusion" by the state. *Cruzan*, 497 U.S. at 288 (O'Connor, J., concurring) (citing *Washington* v. *Harper*, 494 U.S. 210, 221 (1990)); *see also Parham v. J. R.*, 442 U.S. 584, 600 (1979). Otherwise, the state could render a dying patient a "captive of the machinery required for life-sustaining measures." *Cruzan*, 497 U.S. at 288.

1. Pregnancy Does Not Diminish a Person's Right to Direct Medical Treatment.

The fundamental right to direct medical care, including the right to refuse treatment, is not altered during pregnancy. *See In re A.C.*, 573 A. 2d 1235 (reversing a trial court's ruling granting doctors' petition to perform a caesarean section on a terminally ill patient who was 26 weeks pregnant, against the patient's wishes); *People v. Doe (In re Doe)*, 632 N.E.2d 326 (Ill. App. 1994) (holding that a competent woman who was 35 weeks pregnant had a right to refuse a cesarean section that might save the life of her fetus); *see also Commonwealth v. Pugh*, 969 N.E.2d 672, 690 (Mass. 2012) (failure to seek medical care during home delivery is not a basis for criminal liability – there is no duty to summon, let alone submit to, medical treatment during childbirth); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997) (recognizing a pregnant

woman's right to refuse less invasive procedures such as blood transfusions to save her own life and potentially the life of a fetus). As the D.C. Court of Appeals observed in *In re A.C.,* "[W]e must determine who has the right to decide the course of medical treatment for a patient who, although near death, is pregnant with a viable fetus. . . . We hold that in virtually all cases the question of what is to be done is to be decided by the patient -- the pregnant woman -- on behalf of herself and the fetus." 573 A. 2d at 1237; *see also People v. Doe*, 632 N.E.2d at 329 ("The court has seen no case that suggests that a mother or any other competent person has an obligation or responsibility to provide medically for a fetus, or for another person for that matter.").

As the *Doe* court explained, a pregnant person "retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant. The potential impact upon the fetus is not legally relevant…" *Id.* at 332.[5] This is because our legal system reflects a deep respect for the moral agency of the individual, and rejects the notion that one human being can be legally compelled "to give aid or to take action to save another human being or to rescue. . ." *In re A.C.,* 573 A. 2d at 1244 (quoting *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (Pa. Ct. Comm. Pl. 1978) (refusing to order defendant to donate bone marrow which was necessary to save the life of his cousin)). This is so "even where the two persons share a blood relationship, and even where the risk to the first person is perceived to be

[5] There have been cases in which courts have overridden a pregnant patient's right to decide her own course of treatment. The reasoning of those cases is not persuasive, however, because the courts failed to even consider the constitutionally protected right to refuse medical treatment. *See, e.g., Jefferson v. Griffin Spalding Cty. Hosp. Auth.,* 274 S.E. 2d 457 (Ga. 1981) (ordering that cesarean section be performed on a woman thirty-nine weeks pregnant, reasoning that the procedure would save both the pregnant woman and her fetus); *Crouse Irving Mem'l Hosp., Inc. v. Paddock*, 485 N.Y.S.2d 443 (N.Y. Sup.Ct. 1985) (ordering transfusions over religious objections to save the pregnant woman and her fetus); *In re Jamaica Hospital*, 491 N.Y.S.2d 898 (N.Y. Sup.Ct. 1985) (ordering a blood transfusion to be performed on a Jehovah's Witness who was eighteen weeks pregnant, who objected on religious grounds).

minimal and the benefit to the second person may be great." *People v. Doe*, 632 N.E.2d at 333; *see also In re Guardianship of Pescinski*, 67 Wis. 2d. 4 (Wisc. 1975) (denying request for an order to remove a kidney of a person who had been declared incompetent, and transfer the kidney to a sister.).

Reasonable people may disagree about what is moral in a given case; indeed, each Plaintiff has her own advance directive, and they are not identical. *See* Compl. for Declaratory and Injunctive Relief ¶ 19–22. However, the power to decide whether to submit to medical treatment lies with the individual, not the state. "Morally, this decision rests with [the patient]. . . . For our law to *compel* [a person] to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn." *McFall*, 10 Pa. D & C 3d at 91.[6]

2. That the State May Prohibit Some Post-Viability Abortions Does Not Empower the State to Forcibly Subject Pregnant People to Unwanted Medical Interventions.

Contrary to Defendants' claims, "[t]he fact that the state may prohibit post-viability pregnancy terminations does not translate into the proposition that the state may intrude upon the woman's right to remain free from unwanted physical invasion of her person when she chooses to carry her pregnancy to term." *Doe*, 632 N.E.2d at 334. Prohibiting abortion in the limited circumstances of post-viable pregnancies where the pregnant woman's health and life are not at risk is not the same as forcibly subjecting that person to unwanted medical interventions.

[6] Medical ethics also compel this conclusion. As the leading professional association of obstetrician-gynecologists explains, "[p]regnancy is not an exception to the principle that a decisionally capable patient has the right to refuse treatment, even treatment to maintain life." The Am. Coll. of Obstetricians and Gynecologists Committee on Ethics, *Committee Opinion No. 664: Refusal of Medically Recommended Treatment During Pregnancy* 1 (2016).

To conclude otherwise would be to reduce pregnant people to the status of state-operated incubators. This conjures up images of a dystopian future in which all humans near the end of life could be kept alive and harvested for their parts in order to save others.[7] Such practices would be unconscionable to most people. In fact, Idaho finds the idea of compelling someone to give of their body to save another so abhorrent that it has passed a law to prohibit it even after death, and even if the beneficiary is a living child or other relative of the donor. I.C. § 39-3407(4) (providing that ". . . an individual's unrevoked refusal to make an anatomical gift of the individual's body or part bars all other persons from making an anatomical gift of the individual's body or part."). Yet Idaho deems it proper to require a pregnant person while still living to donate her entire body for the benefit of the fetus. Such a scheme not only deprives pregnant people of their fundamental right to bodily integrity – it robs them of their humanity.[8] Because the Pregnancy Exclusion violates the right to medical decision-making, the proper analysis is whether the state's infringement of pregnant Idahoans' rights is justified by a compelling state interest, and whether the Act is narrowly tailored to further that interest.

[7] As Justice Brennan observed in his dissent in *Cruzan*, "it is not apparent why a State could not choose to remove one of [the patient's] kidneys without consent on the ground that society would be better off if the recipient of that kidney were saved from renal poisoning. . . Patches of her skin could also be removed to provide grafts for burn victims and scrapings of bone marrow to provide grafts for someone with leukemia. Perhaps the State could lawfully remove more vital organs for transplanting into others who would then be cured of their ailments . . . Indeed, why could the State not perform medical experiments on her body, experiments that might save countless lives, and would cause her no greater burden than she already bears by being fed through the gastrostomy tube? This would be too brave a new world for me and, I submit, for our Constitution." *Cruzan*, 497 U.S. at 313, n.13, (Brennan, J., dissenting) (citations omitted).

[8] As the *A.C.* court explained, it is absurd – not to mention offensive to human dignity – to suggest that there is some distinct duty that pregnant people bear to their fetuses that no other person bears to another. 'It has been suggested that fetal cases are different because a woman who "has chosen to lend her body to bring [a] child into the world' has an enhanced duty to assure the welfare of the fetus. . . . . Surely, however, a fetus cannot have rights in this respect superior to those of a person who has already been born.." *In re A.C.*, 573 A. 2d at 1244 (internal citation omitted). There is no constitutionally supportable reason to exempt pregnant people from this legal framework.

B. The State Interest Recognized in *Casey* Is Not Sufficiently Compelling to Justify the Violation of Plaintiffs' Constitutional Rights.

As the Supreme Court has recognized, "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S. at 857; *see also, Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905). Even bans on post-viability abortions must have exceptions that recognize the primacy of the pregnant person's life and health. *Casey*, 505 U.S. at 846.

At stake in this case is a related, constitutionally protected interest that also remains paramount throughout pregnancy – the right to be free from government intrusion into one's bodily integrity. Just as the state's interest in fetal life cannot outweigh a woman's interest in her life or health, it cannot outweigh her freedom from forced bodily intrusions by the state.

Government efforts to impose invasive medical procedures on pregnant people are not new. In adjudicating challenges to these bodily invasions, some courts have (improperly) relied upon a claimed state interest in potential life to justify forcing medical interventions on pregnant women. *See, e.g., Burton v. Florida*, 49 So. 3d 263 (Fla. Dist. Ct. App. 2010) (overruling trial court's decision to permit hospital to detain a pregnant woman as violative of the Florida constitution, but holding that a state's compelling interest in potential life might, in other circumstances, justify infringement of that right if narrowly tailored); *see also Pemberton v. Tallahassee Mem. Regional Med. Ctr., Inc.*, 66 F. Supp. 2d 1247 (N.D. Fl. 1999) (holding that the state's interest in potential life outweighed the plaintiff's constitutional right to refuse to have a cesarean section). These courts' reasoning must be rejected however, because it misconstrues the significance of the state interest in "potential life." *See People v. Doe*, 632 N.E.2d at 334.

Moreover, the assertion that the statute somehow furthers Idaho's purported interest in potential life is simply wrong because it assumes that keeping a dying pregnant person alive will result in a live birth. But according to a Nebraska hospital that performed such a procedure in 2015 *in accordance with the pregnant woman's and her family's wishes,* there had been only 33 such cases reported in medical literature since 1982.[9] Thus, the state interest here cannot legitimately be construed as a state interest in protecting life, let alone a compelling interest. Instead, the State is demanding that a dying person endure invasive treatment against their wishes, and in derogation of their constitutional freedoms, in favor of a medical gamble.

Further, the Act itself, and other Idaho policies, demonstrate the paucity of the claimed state interest in potential life in this context. The Act does not permit the state to dishonor an advance directive when a child might be relying on that person's survival. It does not allow physicians to ignore an advance directive and keep a person alive to harvest their organs for the benefit of their children's or others' lives. Other statutes similarly ensure the interest of individual autonomy over protection of others' lives. For example, as noted above, Idahoans, even after death, cannot be forced to donate their organs to save another's life. I.C. § 39-3407(4); *see also* I.C. §§ 18-1501(4) and 18-401(2) (exempting from criminal prosecution parents who allow their children to die rather than seek medical intervention because of the parents' religious beliefs). Idaho's failure to impose similar obligations on other Idahoans who are not pregnant undermines Defendants' claims that its interest in the Pregnancy Exclusion is compelling.[10]

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[9] CBS News, l, *Baby Born to Brain-Dead Mom Leaves Hospital*, (June 10, 2015), https://www.cbsnews.com/news/angel-perez-baby-born-to-brain-dead-mom-leaves-omaha-hospital/.

[10] Justice Brennan made a similar observation about the state's purported interest in *Cruzan*, 497 U.S. at 314, n. 15, Brennan dissenting. As Justice Brennan noted, "In any event, the state interest identified by the Missouri Supreme Court -- a comprehensive and 'unqualified' interest in preserving life . . . is not even well supported by that State's own enactments . . . ." *Id.* (citations omitted). For example, Missouri had no law requiring every person to procure

C. The Pregnancy Exclusion Is Unconstitutional Because It Is Not Narrowly Tailored to Further the State's Purported Purpose

While there may be an exceptionally rare scenario in which the state's interest would be so compelling as to trump a terminal patient's fundamental liberty interest, pregnancy itself is not such a circumstance. "[I]n virtually all cases the decision of the patient, albeit discerned through the mechanism of substituted judgment, will control. We do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional. This is not such a case. . . Indeed, some may doubt that there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a caesarean section, against that person's will." *In re A.C.*, 573 A. 2d at 1252.

Rather than even attempting to identify the rare case in which state intervention may be permissible, however, the Pregnancy Exclusion voids all pregnant persons' advance directives in their entirety. I.C. § 39-4510. The statute does not consider whether the patient is in pain; the invasiveness of the procedure; the wishes of family; or whether the fetus might survive. The statute does not even include an exception for patients who object to treatment on religious grounds. "Religious liberty . . . similarly requires that a competent adult may refuse medical treatment on religious grounds." *People v. Doe*, 632 N.E.2d at 331.

Even those courts that have held that a state interest in potential life could overcome the right to refuse medical intervention demand that any such intrusion be narrowly tailored. *See,*

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needed medical care, nor did Missouri have a state insurance program to underwrite such care. Meanwhile, the state had a living will statute that specifically encouraged the pre-planned termination of life, and actively provided for its citizens to choose a natural death under certain circumstances. Moreover, Missouri had not chosen to require court review of every decision to withhold or withdraw life support made on behalf of an incompetent patient. Thus, Justice Brennan reasoned, Missouri's interest in life was not so unqualified after all.

e.g., *Burton*, 49 So. 3d at 266. Yet the Pregnancy Exclusion, and the state pronouncements about its scope, void the advance directives of everyone who becomes pregnant, without exception. This is the antithesis of the narrow tailoring that strict scrutiny demands.

D. The Statute Fails to Provide Any Due Process Whatsoever.

Where the state proposes to deprive pregnant people of their fundamental right to liberty, the Fourteenth Amendment, at minimum, commands that the state must afford them due process of law. "An adversarial proceeding is of particular importance when one side has a strong personal interest which needs to be counterbalanced to assure the court that the questions will be fully explored." *Cruzan*, 497 U.S. at 318 (Brennan dissenting); *see also In re A.C.*, 573 A. 2d at 1248 (discussing the demands of due process in cases such as this). Were a pregnant person to become incapacitated without an advance directive, the normal course of action would be for the hospital to seek a substitute decision-maker, such as a family member, or in an emergency attempt to employ substituted judgment or, if necessary, obtain court permission for any proposed treatment or withdrawal of treatment. I.C. § 39-4504. Yet, rather than respect this normal process, Idaho irrationally disregards the primacy of the directives for all people who are pregnant. Because the Pregnancy Exclusion entirely eliminates procedural due process, and for all the reasons explained above, it violates pregnant people's rights under the due process clause of the Fourteenth Amendment.

V. The Pregnancy Exclusion Is Unconstitutional Because It Denies to Pregnant People the Equal Protection of the Law.

The Pregnancy Exclusion also violates the constitutional right of pregnant Idahoans to equal protection, both because it burdens the fundamental right to medical decision-making, and

because it singles out pregnant people for differential treatment in service of no valid state purpose. Because it is irrational, Idaho's statute cannot survive any level of scrutiny.

The Fourteenth Amendment provides that no person within the jurisdiction of the United States shall be denied the equal protection of the law. U.S. Const. amend. XIV, § 1. As the U.S. Supreme Court has explained, the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 435, 439 (1985)). Courts analyze claims of unequal protection by looking to the nature of the affected right, as well as the nature of the class of people burdened by the challenged state action. *Cleburne*, 440-441. The highest level of judicial review – strict scrutiny – is reserved for laws that discriminate against a "suspect" class, or that burden a fundamental right. *Id*. Gender-based classifications are subjected to "heightened scrutiny," while courts review laws that do not implicate classes of people historically targeted for discrimination for rational basis. *Cleburne*, 441-442. While rational basis review is deferential, it is not merely a rubber stamp for state action. "The rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*quoting Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (as amended)).

A. The Pregnancy Exclusion Violates the Equal Protection Clause Because It Burdens the Fundamental Right to Direct Medical Treatment

A law that singles out a group of people for unique burdens on their fundamental right is unconstitutional under the Equal Protection Clause "unless shown to be necessary to promote a compelling government interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). As explained previously, the Pregnancy Exclusion violates the fundamental right of pregnant people to refuse medical treatment. For the same reasons discussed above, the Pregnancy Exclusion cannot

survive strict scrutiny, as it is not narrowly tailored to promote a compelling state interest. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) ("where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

B. The Pregnancy Exclusion is Invalid Under the Equal Protection Clause Because It Is Irrational

While the fact that the Pregnancy Exclusion burdens pregnant people's fundamental right to medical decision-making is sufficient to end the analysis, the law cannot survive even rational basis review. When a statute singles out a class of people for differential treatment, but does not burden a fundamental right or a suspect class, "there [still] must exist some rational connection between the state's objective for its legislative classification and the means by which it classifies its citizens." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002) (holding that there was no rational basis for exempting retired peace officers from a California statute that imposed certain requirements on owners of assault weapons) *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008); *Rothery v. Cty. of Sacramento*, 700 Fed. Appx. 782 (9th Cir. 2017), petition for cert. filed, (U.S. July 27, 2018) (No. 18-121)). "A statutory exemption that bears no logical relationship to a valid state interest fails constitutional scrutiny." *Id.* at 1091; *see also Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (striking down a statute exempting certain pest-controllers, but not others, from California's pest-control licensing scheme and from possible criminal conviction for operating without a license, where the distinction that the statute drew bore no relation to any legitimate government interest). A "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and

substantial relation to the object of the legislation . . .'" *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

Rendering competent adults' advance directives void because they are pregnant is irrational, for several reasons. First, it is under-inclusive. If Idaho really means to void advance directives for people because someone else may rely on their body to sustain their lives, then the law must also make exceptions where other third parties may be relying on the dying patient, or where the patient's organs could be used to benefit another. There is no rational reason to require pregnant people to give up their constitutional right to bodily integrity for a (highly attenuated) state interest in fetal life, but not void the advance directives of parents with dependent children, or potential organ donors. *See In re A.C.*, 573 A. 2d at 1244 ("[s]urely, however, a fetus cannot have rights in this respect superior to those of a person who has already been born.").

The Pregnancy Exclusion also fails the rational basis test because it flouts medical ethics standards. As the American College of Obstetricians and Gynecologists (ACOG) explains, "[p]regnancy is not an exception to the principle that a decisionally capable patient has the right to refuse treatment, even treatment to maintain life."[11] Pregnancy exclusions inherently clash with the ethical obligations of physicians and hospitals to follow patient directives. Thus, ACOG "opposes the use of coerced medical interventions for pregnant women, including the use of the courts to mandate medical interventions for unwilling patients."[12]

Further, nullifying the advance directives of pregnant person is irrational because it undermines the purpose of the statute. As explained above, advance directive statutes exist to help prevent confusion, give assurance to health care providers that they can ethically provide or

[11] Am. Coll. of Obstetricians and Gynecologists Committee on Ethics at 1.

[12] *Id.* at 2.

not provide treatment, and avoid the need for contentious judicial proceedings in the event someone is incapacitated and cannot consent to or decline treatment.

In short, the Pregnancy Exclusion is irrational. It is true that courts generally grant states broad leeway in legislative line-drawing. *See Dandridge v. Williams*, 397 U.S. 471, 486-7 (1970) ("The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."). But, when a state treats similarly situated people differently for no legitimate reason, it violates the Equal Protection Clause. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (striking down Colorado constitutional amendment prohibiting state and judicial recognition of discrimination against LGBT people); *see also Plyler v. Doe*, 457 U.S. 202 (1982) (striking down under rational basis review Texas law denying public education to undocumented immigrant children).

C. The Pregnancy Exclusion is Invalid Under the Equal Protection Clause Because It Is Gender-Based Discrimination

Absent a regime that eliminated the decisional autonomy of all Idahoans on whom someone else could rely, the only logical conclusion is that Idaho has singled out pregnant women for discriminatory treatment based on gender. But singling out one class of people for differential treatment is a serious constitutional harm, because it "perpetuat[es] 'archaic and stereotypic notions' or. . . stigmatizes members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community." *Heckler v. Mathews*, 465 U.S. 728, 739-740; *see Latta v. Otter*, 2014 U.S. App. LEXIS 19620, cert. denied by *Idaho v. Latta*, 135 S. Ct. 2931 (2015) (affirming district court decision striking down Idaho's ban on marriage equality and holding that classifications based on sexual orientation are subject to heightened scrutiny).

Thus, the constitutional problem is not only that the Idaho law invalidates the advance directives of pregnant women, but no other competent adults. It is that Idaho's actions demean people who can become pregnant, suggesting that their decisions about their health, and when and whether to allow bodily interventions to maintain their lives, are less worthy of state respect than the decisions of others.[13] This demeaning treatment is grounded in gendered expectations of women's roles, including the capacity for pregnancy and childbearing, once used to justify laws excluding women from civic, professional, and political life. *See Casey*, 505 U.S. at 897 ("Only one generation has passed since this Court observed that 'woman is still regarded as the center of home and family life' with attendant 'special responsibilities' that precluded full and independent legal status under the Constitution.").

Such treatment is no longer constitutionally permissible. *Id*.; *see also J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 128 (1994) (holding that peremptory challenges exercised on the basis of gender violate the Equal Protection Clause). As the U.S. Supreme Court has explained, "[i]ntentional discrimination on the basis of gender by state actors . . . serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id*. at 130-131.[14] Now, rather than defer to a state's reliance on such stereotypes, courts subject laws that deny equal protection because of sex to more searching scrutiny. *Reed*, 404

[13] *See* Katherine Taylor, *The Pregnancy Exclusions: Respect for Women Requires Repeal*, 14 The Am. J. of Bioethics 50, 51 (2014).

[14] *Geduldig v. Aiello*, 417 U.S. 484 (1974) is no barrier to recognizing Idaho's ban on pregnant people's advance directives as a gender-based classification. While the Supreme Court in *Geduldig* held (controversially) that pregnancy discrimination is not necessarily *per se* sex discrimination, the classification in that case (excluding pregnancy from state disability coverage because of cost) was not, like the classification here, grounded in stereotypes about the roles of women as especially bound to sacrifice themselves in the service of childbearing and motherhood. Moreover, the court's reasoning in that case (wrongheaded as it was; *see Id.* at 497-8, Brennan dissenting), was based on the idea that everyone, regardless of gender, was included in a state disability program, and that pregnancy was a condition excluded from that list. Unlike the Pregnancy Exclusion, what was at issue in *Geduldig* was not a wholesale deprivation of the rights created under a state program.

U.S. 71 (holding that an Idaho law that preferred male estate administrators over equally qualified female administrators violated the Equal Protection Clause).

A sex-based classification is constitutional only if the government can identify an important governmental interest and demonstrate that the classification is substantially related to that interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that an Oklahoma law that allowed women over 18 to purchase nonalcoholic beer, but required men to be over 21, violated the equal protection rights of men under the age of 21); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Air Force violated equal protection rights of appellants, Air Force lieutenant and her husband, by refusing to recognize the lieutenant's husband as her dependent). The justification for the classification must be genuine, not hypothesized or a post hoc rationalization, or based on archaic generalizations about the sexes. *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Virginia Military Institute violated women's equal protection rights by refusing to admit them as students). "[J]ustification[s] must be genuine . . . and must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females" cannot survive heightened scrutiny. *Id*. at 533.

While it is true that women who do not become pregnant will not face the same ultimate deprivation of their rights and dignity, were they to become incapacitated, that does not eliminate the stigmatic harm that this exclusion works on everyone with the capacity to become pregnant (or, for that matter, any woman, no matter her age). The Pregnancy Exclusion is offensive to women's dignity. As Plaintiffs demonstrate, adults with the capacity to become pregnant and make advance directives have the ability to decide for themselves what medical treatment they would accept in the event they were pregnant and unable to consent to or decline medical care. The Pregnancy Exclusion – and the state agencies' unauthorized assertion that all pregnant

people will be maintained on life support until their pregnancy ends – is demeaning to the people it targets. In the 21st century, it is far past time to reject laws grounded in nothing but stereotypes and mistaken assumptions about people based on their gender.

In sum, because the right to equality is not suspended during pregnancy, and because there is no state interest sufficient to sustain the Pregnancy Exclusion under any standard of review, the Pregnancy Exclusion is unconstitutional.

VI. Conclusion

This Court should reject Defendants' argument that Plaintiffs must meet the controversial "no set of circumstances" standard for facial challenges set forth in *Salerno*. Regardless, the Pregnancy Exclusion is patently facially unconstitutional, because it violates the fundamental rights to bodily integrity, to direct medical treatment – including the right to refuse that treatment – and to equality under the law. These rights survive throughout pregnancy. Accordingly, Plaintiffs respectfully request that this Court deny Defendants' motion.

DATED: September 19, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of September, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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