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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 DAVE JEPPESEN, as Director of the Idaho Department of Health and Welfare in his official capacity,

Defendants.

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs, like other Idahoans, have the constitutional rights to bodily integrity, to procedural due process, to be treated equally under the law, and to be free from state compulsion to say that which they do not believe. When Plaintiffs executed their advance directives under Idaho's Medical Consent and Natural Death Act to ensure that their decisions to either refuse or consent to medical treatment would be honored if they became incapacitated, the Act's "Pregnancy Exclusion" immediately diminished and potentially nullified their directives, in violation of those rights.

The Pregnancy Exclusion, a mandatory element of Idaho's model advance directive, requires Plaintiffs to either adopt the State's decision about the medical treatment they are to receive if they become incapacitated while pregnant, or leave the State's language out of their directives, rendering them legally unenforceable. This state imposition violates Plaintiffs' fundamental rights to freedom of speech protected by the First Amendment, and to their Fourteenth Amendment rights to substantive due process, procedural due process, and equal protection. Defendants cannot meet their heavy burden of demonstrating a compelling state interest that justifies the override of Plaintiffs' constitutional rights. Nor can they demonstrate, as they must, that the law is narrowly-tailored to achieve their claimed interest.

As there is no dispute of material fact between the parties, Plaintiffs are entitled to judgment as a matter of law that the Pregnancy Exclusion is unconstitutional as applied to them under the First and Fourteenth Amendments, and facially unconstitutional under the First Amendment.

II. FACTUAL BACKGROUND

Idaho's Medical Consent and Natural Death Act ("the Act") was passed "in recognition of the dignity and privacy which persons have a right to expect," and "recognize[s] the right of a competent person to have his or her wishes for medical treatment and for the withdrawal of artificial life-sustaining procedures carried out even though that person is no longer able to communicate with the health care provider." I.C. § 39-4509. To effectuate this purpose, the Act

provides a Model Form, instructing that a valid directive "shall be in substantially the following form, or in another form that contains the elements set forth in this chapter." I.C. § 39-4510. The Model Form includes the following element: "If I have been diagnosed as pregnant, this Directive shall have no force during the course of my pregnancy." *Id*. ("The Pregnancy Exclusion.")

Plaintiffs understand that the Pregnancy Exclusion is mandatory, and that, without it, their advance directives are invalid. They are not alone in this reading of the law. Since 2005 when the Act was enacted until after this litigation was filed, Defendants informed the public that the advance directives of incapacitated people would be disregarded if they are pregnant. *See* Dkt. 42, ¶¶ 30-32. A frequently asked questions document ("FAQ document") posted on several official government websites stated: "What if I am pregnant when I become incapacitated? Life sustaining measures will continue regardless of any directive to the contrary until the pregnancy is complete." Dkt. 42, ¶¶ 30-32. This language remained on government websites even after this litigation commenced; Defendants only began to remove it after this Court denied their motion to dismiss. Despite Defendants' attempts to excise it, the FAQ document continued to be available on government websites until December of 2020. Dkt. 58, ¶¶ 20-21.

Although Defendants have now taken the position that the Pregnancy Exclusion is not mandatory, as of this filing Defendants have never publicly affirmed their new interpretation of the statute, nor have they publicly affirmed that it is no longer the policy of the State to continue life-sustaining treatment "regardless of any directive to the contrary until the pregnancy is complete." Dkt. 58, ¶¶ 17, 20-21. Defendants have not assured Plaintiffs that their directives, if otherwise valid, would be legally enforceable without the Pregnancy Exclusion, nor have they made any statement informing the public that the Pregnancy Exclusion is not a required element of an enforceable advance directive. *See Id*.

Plaintiffs are not reassured by this mid-litigation switch in position. Dkt. 58, ¶¶ 17, 23-24. They remain deeply concerned that if they are pregnant, their health care decisions will not receive the same deference they otherwise would, and that their advance directives will not be

honored because they do not include the Pregnancy Exclusion. *Id.;* Dkt. 42, ¶¶ 27. Given the mandatory language within the Act, as well as the Defendants' longtime interpretation of the Act, Plaintiffs have no guarantee that Defendants, their successors, or medical professionals faced with making decisions about whether to follow their directives will continue to take the position Defendants now hold.

Plaintiffs Anna Almerico, Mikaela de Loyola-Carkin, Chelsea Gaona-Lincoln, and Hannah Sharp are all Idaho women of childbearing age who have been pregnant and have children. Dkt. 42, ¶ 16. Ms. Gaona-Lincoln and Ms. Sharp were pregnant and gave birth to children during this litigation. Dkt. 42, ¶¶ 19, 21.

Each Plaintiff created an advance directive determining the treatment they would consent to or not consent to if they were to become incapacitated. All of the Plaintiffs want these decisions to be respected regardless of whether they are pregnant, so they did not include the Pregnancy Exclusion in their directives. Dkt. 42, ¶ 17. Ms. Almerico's and Ms. Sharp's directives state that, if they were pregnant and the fetus is at or past the point of viability, they want and consent to life-sustaining treatment. Dkt. 42, ¶¶ 18, 21. All Plaintiffs made their advance directives to ensure that their end-of-life medical treatment aligns with their values and beliefs. Dkt. 42, ¶ 17. They also designated health care agents to effectuate these decisions. Plaintiffs memorialized their health care decisions in advance directives because they want those decisions to be honored, regardless of their pregnancy status. Dkt. 42, ¶ 17.

Plaintiffs either registered, or attempted to register, their directives with the Secretary of State as provided in the Act. Dkt. 58, ¶ 12. Plaintiffs understand that the Secretary of State automatically registers directives once submitted, and that registration is not a determination by the State or any other entity as to whether their directives will be honored in the event they are incapacitated. *See* Dkt. 58, ¶¶ 3-5. Rather, registration adds their directives to a database that, if accessed by their health care providers, makes it easier to find them. I.C. § 39-4515(4).

The Coronavirus Disease 2019 ("COVID-19") pandemic has heightened Plaintiffs' concerns regarding the validity and enforceability of their advance directives. Since this case was

filed, there have been over 15 million cases of COVID-19 in the United States alone.[1] Over 300,000 people in the United States have died from complications related to the virus[2] and that number currently is growing by over 2,200 every day.[3] As of December 13, 2020, there have been over 122,000 cases of COVID-19 in Idaho and 1,194 Idahoans have died from the illness.[4]

For Plaintiffs, and for people throughout the nation, the need for a legally enforceable directive is even more critical now, given the risks posed by COVID-19.[5] Patients with COVID-19 are at an increased risk of invasive interventions, such as mechanical ventilation, that limit or eliminate their ability to communicate.[6] The likelihood of having severe COVID-19 illness that may lead to these interventions is higher for people with certain medical conditions, including diabetes and asthma; Ms. de Loyola-Carkin has diabetes and Ms. Sharp has asthma. *See* de Loyola-Carkin Decl., ¶ 12, filed herewith; *see* Sharp Decl., ¶ 13, filed herewith. Pregnant people are also at an increased risk for death or severe illness from COVID-19, and are more likely to be admitted to the intensive care unit and to receive invasive ventilation.[7] Ms. Gaona-Lincoln plans to become pregnant soon and recognizes that a pregnancy would put her at an increased risk for severe complications from COVID-19. *See* Gaona-Lincoln Decl., ¶¶ 13-14, filed herewith.

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[1] Centers for Disease Control and Prevention, CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days, last visited Dec. 13, 2020.
[2] *Id*.
[3] Lisa Marie Pane and Rachel La Corte, *US Virus Deaths Hit Record Levels with the Holidays Ahead*, AP, Dec. 9, 2020, https://apnews.com/article/us-coronavirus-deaths-hit-record-levels-9ce64924281ff1058fbf391407c8ba50.
[4] Idaho, Official Resources for the Novel Coronavirus, https://coronavirus.idaho.gov/, last visited Dec. 13, 2020.
[5] *See, e.g.*, Catherine Auriemma et al., *Completion of Advance Directives and Documented Care Preferences During the Coronavirus Disease 2019 (COVID-19) Pandemic*, July 20, 2020, available at https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768372; Danielle Christina Funk et al., *How COVID-19 Changed Advance Care Planning: Insights from the West Virginia Center for End-of-Life Care*, 60 J. of Pain and Symptom Management e5 (Dec. 2020), available at https://www.jpsmjournal.com/article/S0885-3924(20)30756-9/fulltext.
[6] See Carrie McMillan, *Ventilators and COVID-19: What You Need to Know*, Yale Medicine, June 2, 2020, https://www.yalemedicine.org/news/ventilators-covid-19.
[7] See Laura D. Zambrano et al., Centers for Disease Control and Prevention, *Update: Characteristics of Symptomatic Women of Reproductive Age with Laboratory-Confirmed SARS-CoV-2 Infection by Pregnancy Status*, Morbidity and Mortality Weekly Report, Nov. 6, 2020, https://www.cdc.gov/mmwr/volumes/69/wr/mm6944e3.htm.

The decisions Plaintiffs have made about their medical treatment should they become incapacitated, including the decisions they have made about what treatment they would consent to or refuse if they were pregnant in those circumstances, are profoundly important to them. So too are the decisions they have memorialized in those directives appointing loved ones to effectuate their decisions. Plaintiffs want those decisions to be honored, not overridden by the statutory mandate that advance directives must include the Pregnancy Exclusion. Dkt. 58, ¶ 35.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, the court should construe the evidence "in [a] light most favorable to the non-moving party." *Nolan v. Heald Coll.*, 551 F.3d 1148, 1154 (9th Cir. 2009).

Only a genuine dispute over a *material* fact, defined as one that "might affect the outcome of the suit," precludes summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if there is "sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

The party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party only needs to show "that there is an absence of evidence to support the nonmoving party's case" on issues for which the nonmoving party will bear the burden of proof at trial. *Id.* at 325.

IV. ARGUMENT

Between these parties there are no genuine issues of material fact; the dispute is entirely legal in nature. Defendants now stipulate, despite years of saying the opposite, that the Pregnancy Exclusion in the Act is not mandatory, but this new interpretation is not supported by the plain language of the law. I.C. § 39-4510 (a valid directive "*shall* be in substantially the

following form, or in another form that contains the elements set forth in this chapter.") (emphasis added). In Idaho, the word "shall" in a statute means that the provision is mandatory. *Twin Falls County v. Idaho Comm'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) (citing *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995) and *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 134, 176 P.3d 126, 139 (2007)). While the Act provides options in the Model Form, and states that "any portions . . . which are left blank . . . shall not invalidate the document," I.C. § 39-4510, the Pregnancy Exclusion itself is *not* optional. There are no check-boxes or blanks in the statutory form that allow a person to opt out of that element. Accordingly, the Pregnancy Exclusion is mandatory, and because it is mandatory, it violates Plaintiffs' and other Idahoans' rights to freedom of speech, medical decision-making, procedural due process, and equal protection.

A. The Pregnancy Exclusion Violates the First Amendment and Is Invalid Both Facially and As Applied to Plaintiffs.

The Pregnancy Exclusion impermissibly restricts the First Amendment rights of all Idahoans, including Plaintiffs, and is therefore invalid facially and as applied because it is (1) an impermissible content-based regulation of speech, (2) overbroad, and (3) vague.

A successful facial challenge requires a plaintiff to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). This "'no set of circumstances' test is the subject of considerable controversy" and has been questioned by this Court. Dkt. 17 at 5. While the applicability of the "no set of circumstances" test remains uncertain, the Supreme Court expressly carved out an exception for First Amendment claims. "In the First Amendment context . . . this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). [8]

[8] This Court previously acknowledged that *Salerno*'s "no set of circumstances" test does not apply to facial challenges under the First Amendment. *See* Memorandum Decision & Order at 6, *Almerico v. Denney*, Dkt. 33 (D. Idaho Mar. 28, 2019).

1. The Pregnancy Exclusion Both Compels and Censors Speech.

The First Amendment protects the right to speak and not to speak. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). "[T]he Amendment may prevent the government from compelling individuals to express certain views," just as it prohibits impermissible government censorship of speech. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Content-based speech restrictions that "target speech based on its communicative content" are presumed to be unconstitutional and are only acceptable if narrowly tailored in pursuit of a compelling interest. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018) (quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)). The test for whether a restriction on speech is content-based is whether "a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163.

The Act requires advance directives to be in "substantially" the same form as the Model Form, which includes the Pregnancy Exclusion. I.C. § 39-4510. This requirement is a content-based regulation of speech that compels people to express the view that they wish their advance directives to be ignored if pregnant, regardless of the decision they actually want to make, thereby forcing them to say something contrary to that decision. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371. The Pregnancy Exclusion is particularly vexing because it is axiomatic that no one executes an advance directive hoping it will be disregarded. This statement is compelled because, by the statute's terms, if a person—like Plaintiffs here—does not include this statement in their directive, the directive is, or is at substantial risk of being, rendered invalid for failing to substantially conform to the Model Form. By conditioning the validity of a directive on including a "government-drafted script," Idaho forces all individuals to express a particular view or risk invalidation of their entire directive.[9] *Id.* at 2371 (quoting *Riley v. Nat'l Fed'n of the Blind of N.C. Inc.*, 487 U.S. 781, 795 (1988)).

The harm to women of childbearing age under the First Amendment goes even farther.

[9] Particularly for women who are pregnant or trying to become pregnant, the Pregnancy Exclusion may stifle their speech altogether by dissuading them from executing an advance directive at all.

Including this language not only compels them to speak a message with which they by definition do not agree, it also stifles them from expressing what medical care they would or would not consent to in the event that they are pregnant and incapacitated. When an individual is required to affirmatively state that their advance directive will have no force during their pregnancy, they are prevented from detailing the care they would actually want if pregnant and incapacitated. This is true even if the individual's decision would be to receive all life-sustaining treatment in the case of pregnancy, as is the case with two of the Plaintiffs. By demanding the expression of one absolutist view regarding pregnancy, the Act forecloses the ability to express any other.

Defendants have, after fifteen years, now changed their position and claim the Pregnancy Exclusion is not a required element of a valid advance directive. This interpretation conflicts with a plain language reading of the law, and is completely at odds with Defendants' prior interpretation that the law required the continuation of all life-sustaining measures "regardless of any directive to the contrary until the pregnancy is complete." *See* Dkt. 42, ¶¶ 30-32. In determining the correct interpretation of the Act, this Court should use the same approach Idaho's highest court would use and "begin with the text of the statute." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004). The Act's plain language "should be given the same meaning" as it is given "among the people who rely on and uphold the statute." *Id*. (*quoting Purco Fleet Servs. Inc. v. Idaho State Dep't of Fin.*, 90 P.3d 346, 349 (Idaho 2004). Applying this rule of interpretation, the Act's plain language stating that directives "shall be in substantially the following form, or in another form that contains the elements set forth in this chapter" unambiguously means that the Pregnancy Exclusion—an element included in the Model Form—must be included. *See Twin Falls County*, 152 Idaho at 349 (the word "shall" in a statute means mandatory).

Defendants' assurance that directives need not include the Pregnancy Exclusion does not correct the constitutional infirmities in the Act, nor does it bar Defendants or future government officials from reverting back to their previous interpretation. "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S.

at 480. Simply put, the Constitution requires more than Defendants' assurances. *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010).

Defendants have provided no interest, compelling or otherwise, that justifies the Pregnancy Exclusion's violation of Idahoans' First Amendment rights. Requiring individuals who execute an advance directive to include instructions to disregard the very directives they just memorialized undercuts Idaho's purpose in enacting the advance directive statute.

2. The Act Is Unconstitutionally Overbroad.

The Pregnancy Exclusion's effect is to disregard the entire advance directive of a person who is incapacitated and pregnant, even the portions of the directive that have nothing to do with pregnancy, such as the designation of a health care agent. The Pregnancy Exclusion therefore not only silences an individual in directing their own medical care but also in determining who speaks on their behalf if they are incapacitated and pregnant. There is simply no justification compelling enough for such a sweeping imposition on the freedom of speech.

Plaintiffs may bring a facial challenge against Idaho's Pregnancy Exclusion because of an "assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). When challenging a statute on overbreadth grounds, the party alleging such an infraction "generally must at least, 'describe the instances of arguable overbreadth of the contested law.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

"In the First Amendment context . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (citing *Wash. State Grange*, 552 U.S. at 449, n.6). The first step in evaluating a statute on overbreadth grounds is construing it to ascertain what it covers and whether it is overbroad. *United States v. Williams*, 553 U.S. 285, 293 (2008). Courts "are not required to insert missing terms into the statute or adopt an interpretation

precluded by the plain language of the ordinance." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). This is especially true for statutes that regulate speech, which must be narrowly tailored. *Broadrick*, 413 U.S. at 611-12.

The Idaho statute is unambiguous: it requires an advance directive to include "the elements" set forth in the statutory template, including the Pregnancy Exclusion. Any contention that the Pregnancy Exclusion is optional is "precluded by the plain language" of the statute and raises serious concerns about the level of unfettered discretion granted to State officials in interpreting and enforcing the Act. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

The Pregnancy Exclusion does not stop at disregarding the portions of the directive that pertain to decisions about consenting to or refusing life-sustaining treatment, but invalidates more protected speech regarding an individual's treatment decisions than is necessary to serve the State's asserted interest in potential life.[10] I.C. § 39-4510 ("If I have been diagnosed as pregnant, *this Directive* shall have no force during the course of my pregnancy.") (emphasis added). The Act defines "directive" to include both the living will and the durable power of attorney for healthcare. *Id*. Consequently, when a person's advance directive is invalidated during pregnancy, not only are their treatment decisions disregarded, but so is their designation of a health care agent authorized to make healthcare decisions unrelated to pregnancy, such as authorized hospital visitors and releases of medical information. *See id*. This categorical invalidation of a person's entire directive occurs even if their treatment decisions further the State's claimed interest.

The Pregnancy Exclusion's sweeping silencing effect occurs anytime it is triggered, restricting constitutionally protected speech in a substantial number of its applications. Defendants have articulated no interest compelling enough to justify such an overbroad infringement on the First Amendment.

[10] Plaintiffs maintain that the Pregnancy Exclusion is unnecessary in all circumstances.

3. The Act Is Unconstitutionally Vague Regardless of Whether the Pregnancy Exclusion is Optional.

Imprecise laws are subject to facial invalidation "if the statute clearly implicates free speech rights." *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir. 2001). For facial relief, "the [law] need not be vague in all applications if it reaches a substantial amount of constitutionally protected conduct." *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (internal citations omitted). A statute is void for vagueness if it fails to provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." *Grayned*, 408 U.S. at 108-09. Additionally, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Id*. Where the vagueness of a statute threatens to chill the exercise of protected First Amendment freedoms, courts require greater clarity than in other contexts. *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996).

The Act requires advance directives to substantially conform to the Model Form, which includes the Pregnancy Exclusion.[11] For over a decade, Defendants considered the Pregnancy Exclusion to be mandatory; indeed they read even more into the statute and interpreted it to mandate life-sustaining treatment on any pregnant incapacitated person until their pregnancy ended. Dkt. 58, ¶ 20. During this litigation, Defendants have adopted inconsistent positions, initially arguing that the Pregnancy Exclusion is a necessary component of an enforceable advance directive[12] and now stipulating that it is not. *See* Dkt. 58, ¶¶ 2, 20.

While Plaintiffs disagree with Defendants' new reading of the Act, their changing interpretation of the Pregnancy Exclusion demonstrates how the law's vagueness leaves Idahoans at risk of subjective interpretation and enforcement by State officials. It is no wonder

[11] As discussed above, this is a content-based restriction on speech and a more stringent vagueness test applies. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

[12] When asked whether the Pregnancy Exclusion is mandatory at the Motion to Dismiss hearing, the State responded, "That's the position we have taken, and I think it's only fair for me to defend that position." Transcript of Motion to Dismiss Hearing, 11:15 Jan. 16, 2019.

that Plaintiffs are not reassured. There is nothing in the Act that prevents the State from re-adopting an interpretation that would compel the inclusion of the Pregnancy Exclusion. *See Stevens*, 559 U.S. at 480; *see also Powell's Books, Inc.*, 622 F.3d at 1215.

Whether or not the Pregnancy Exclusion is required, the Act is unconstitutionally vague. An ordinary person would not understand what the Act requires of them—particularly in light of the recent revelation that Defendants have changed their interpretation of the statute—and may include the Pregnancy Exclusion when they otherwise would not, rather than risk the invalidation of their directive. Defendants' new interpretation does not alter the plain text of the Act or the State's previously publicized representations about the law. The Pregnancy Exclusion violates the First Amendment and should be stricken from the Act, and advance directives without the Pregnancy Exclusion should not be susceptible to challenge for that reason alone.

B. The Pregnancy Exclusion Violates Plaintiffs' Rights to Self-Determination Protected by the Due Process Clause of the Fourteenth Amendment.

The right to determine what is done to one's own body is so well-established that it rises to the level of a fundamental right. State intrusion into fundamental rights is unconstitutional absent a compelling reason, and even then, is impermissible unless the interference is narrowly tailored to further the State's compelling interests. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Pregnancy Exclusion, by negating Plaintiffs' rights to determine what will be done to their bodies in the event they are incapacitated, violates the autonomy guaranteed them by the Fourteenth Amendment to the U.S. Constitution.

1. The Fourteenth Amendment Guarantees the Right to Self-Determination.

The Fourteenth Amendment provides that no state shall "deprive any person of . . . liberty . . . without due process of law." U.S. Const. amend. XIV, §1. This precept protects substantive rights, including "marriage, family, procreation, and the right to bodily integrity," from state intrusion. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-49 (1992)). The Supreme Court has recognized that "[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[.]" *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891). *See also Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287-88 (1990) (O'Connor, J., concurring) ("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."); *Johnson v. Meltzer*, 134 F.3d 1393, 1397 (9th Cir. 1998) ("[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.").

2. The Pregnancy Exclusion Violates Plaintiffs' Fundamental Right to Self-Determination.

The Fourteenth Amendment protects self-determination—the decisional authority over one's own person. One aspect of that self-governing authority is the right to consent to or refuse medical treatment. *Cruzan*, 497 U.S. at 288 (O'Connor, J., concurring) (citing *Washington v. Harper*, 494 U.S. 210, 221 (1990)); *Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014) (recognizing the right to refuse unwanted medical treatment, including life-sustaining measures); *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 522 (9th Cir. 1984) (recognizing "the fundamental principle that a competent [person] has [the] right to determine what shall be done with her own body.") This right is deeply rooted in the "nation's history and constitutional traditions" and is consistent with both "the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment." *Glucksberg*, 521 U.S. at 725. Advance directives are a crucial means to exercising this right, as incapacitated individuals, by definition, lack capacity to make contemporaneous medical decisions.[13]

a. The Pregnancy Exclusion Deprives Plaintiffs of Their Rights to Refuse or Consent to Medical Treatment.

By conditioning the enforceability of Plaintiffs' advance directives—the documented decisions about what treatment they would request or refuse—on their capacity for pregnancy,

[13] The Idaho Legislature recognized the fundamental right to medical decision-making, and that the ability to execute an advance directive is critical to effectuating that right. *See* I.C. § 39-4509.

and claiming the authority to override those decisions without any process whatsoever, the State unconstitutionally interferes with "a person's most basic decisions about…bodily integrity." *Casey*, 505 U.S. at 850.

As a result, Plaintiffs' constitutionally-protected decisions are rendered void or contingent upon their not becoming pregnant, a violation of their fundamental rights. And, if Plaintiffs were to become incapacitated while pregnant, the Pregnancy Exclusion violates their rights again at that point in several ways. It nullifies their previously-directed medical decisions, including by invalidating their appointment of a health care agent. If the State reverts to its previous position, it may subject Plaintiffs to invasive medical treatment without their consent. And, for those Plaintiffs who have set forth their decision to consent to certain life-sustaining treatment, it nullifies their right to have those treatment instructions legally respected.

b. Pregnancy Does Not Alter Plaintiffs' Fourteenth Amendment Rights.

Plaintiffs' fundamental rights to direct their own medical care, including the right to request or refuse treatment, are not diminished because they have the capacity to become pregnant (see Equal Protection argument, *infra*), nor are those rights altered by pregnancy at any stage. *See In re A.C.*, 573 A.2d 1235 (D.C. 1990) (reversing an order to perform a caesarean section over the objection of a patient); *People v. Doe (In re Doe)*, 632 N.E.2d 326 (Ill. App. 1994) (holding that a woman who was 35 weeks pregnant had a right to refuse a cesarean section even when physicians testified the fetus had "close to zero" chance of surviving vaginal birth); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. 1997) (recognizing a pregnant woman's right to refuse less invasive procedures such as blood transfusions recommended 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.*, "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. 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…"

In re Doe, 632 N.E.2d at 332.[14]

In short, the Pregnancy Exclusion violates Plaintiffs' Fourteenth Amendment right to decide whether to consent to or refuse medical treatment—a decision they, like other Idahoans, have the fundamental right to make. *Glucksberg*, 521 U.S. at 720; *see also Casey*, 505 U.S. at 849.

3. The Violation of Plaintiffs' Fourteenth Amendment Rights to Self-Determination Is Not Justified by the State's Claimed Interest.

Idaho's Pregnancy Exclusion elevates the State's claimed interest in potential life over the decisional autonomy of Plaintiffs—who are, in contrast to notional fetal life, living people with constitutional rights. But "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, e.g., Rochin v. California*, 342 U.S. 165 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905)). People retain their civil rights and decisional autonomy throughout pregnancy. Even in the

[14] Only one federal district court has suggested otherwise, denying civil rights claims of a woman forced to have a cesarean surgery over her objection. *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999). While this Court looked to *Pemberton* in analyzing the applicability of *Salerno* to Plaintiffs' facial challenges, respectfully, the *Pemberton* decision is both inapposite here and its reasoning is incorrect. Instead of considering whether the state had a compelling interest that was narrowly tailored to justify its imposition on Ms. Pemberton's fundamental right to medical decision-making, it applied a test of its own devising. Despite the fact that Ms. Pemberton was not seeking an abortion, the court looked to *Roe v. Wade*, 410 U.S. 113 (1973) to suggest that *any* fundamental right must give way to the state's interest in the protection of potential life at the point of viability. This was in error. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'") (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). And though the *Pemberton* court claimed that its analysis was based on Florida law, a subsequent Florida case involving the same hospital overturned an order for bedrest and a cesarean, noting "the test to overcome a woman's right to refuse medical intervention in her pregnancy is whether the state's compelling state interest is sufficient to override the pregnant woman's constitutional right to the control of her person, … [and] the state must then show that the method for pursuing that compelling state interest is narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." *Burton v. State*, 49 So.3d 263, 266 (Fla. Dist. Ct. App. 2010)(citations omitted). Moreover, in no way does the decision in *Pemberton* support the proposition that there is even one circumstance in which the state could invalidate a person's healthcare directive *before* that person ever becomes incapacitated, or ever becomes pregnant.

context of abortion, an individual's right to seek medical care to protect their life and health does not yield to the State's interest in the protection of potential life. *Casey*, 505 U.S. at 846. It would be inconsistent to extinguish Plaintiffs' fundamental right to self-determination to force a course of care that may not, in fact, protect potential life.

a. The State's Asserted Interest Is Not Served by the Pregnancy Exclusion.

Where fundamental rights are at stake, a detailed inspection of the State's claimed interest is required. "[O]ur Constitution requires the government to assert its interests and subject them to scrutiny when it invades the rights of its subjects." *Newman v. Sathyavaglswaran*, 287 F.3d 786, 799 (9th Cir. 2002) (recognizing due process claim against coroner for removal of children's corneas after death without consent of next of kin); *Glucksberg*, 521 U.S. at 721 (articulating the strict scrutiny standard for review of violations of fundamental rights). A close inspection of that interest demonstrates that it is ephemeral, because in this context there exists only the mere possibility that there could be a "potential life" for the State to protect.

Here, the State's only asserted interest in the Pregnancy Exclusion is wholly insufficient to justify "the plenary override" of Plaintiffs' fundamental right to autonomy over their own bodies. *See, Casey*, 505 U.S. at 857. Disregarding Plaintiffs' decisions and requiring that, if they become pregnant and incapacitated, they will be forced to receive life-sustaining treatment comes with no guarantee that such an invasion of their bodies would lead to a live birth.[15] And forcing such treatment over a patient's refusal violates medical ethics,[16] even when performed

[15] 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. 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/.

[16] *See* American College of Obstetrics & Gynecology ("ACOG"), *Committee Opinion No. 617: End of Life Decision-Making*, 125 Obstetrics & Gynecology 261, 265 (January 2015) (explaining that the autonomy of the pregnant woman in end-of-life decisions is paramount, noting that "a health care facility should not attempt to contravene [a pregnant and incapacitated patient's] wishes and values, whether she voices them or they are relayed by a surrogate decision maker.").

after the patient has died.[17] Furthermore, no modern court has found that pregnancy at any stage diminishes women's decisional capacity.

The State's asserted interest is not compelling enough to override Plaintiffs' rights to self-determination and bodily integrity—rights that have long been held "sacred" — even when fetal survival is at stake. *See Union Pac. Ry. Co.*, 141 U.S. at 251; *Casey*, 505 U.S. at 857. Where, as here, there is currently no fetal life to protect, the mere *possibility* that *potential* life may exist in the future is not a state interest that can justify the Pregnancy Exclusion's deprivation of Plaintiffs' rights to fully exercise their decisional capacity.

Indeed, the sacred rights to bodily integrity and self-determination are paramount even when the life of another person is at stake. 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. . ." *See McFall v. Shimp*, 10 Pa. D & C 3d 90, 91 (1978) (in denying a request to order a man to give life-saving bone marrow to his cousin, explaining "[f]or 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"). This principle applies "even where the two persons share a blood relationship, and even where the risk to the first person is perceived to be minimal and the benefit to the second person may be great." *In re 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.). Idaho's interest here is simply not compelling enough to override rights of this magnitude.

[17] *Id*. (Keeping a deceased pregnant patient on life support to continue the pregnancy "may be ethically permissible" if done at the request of a surrogate decision maker, but "[i]t is unethical to attempt to coerce a surrogate decision maker into agreeing to technical support that is contrary to the woman's treatment preferences or the surrogate decision maker's interpretation of the wishes of the patient.").

b. In Other Contexts, the State Prioritizes Bodily Autonomy Over the Lives of Others, Belying Its Stated Interest in the Pregnancy Exclusion.

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 disregard a person's advance directive when an existing child might be relying on that person's survival. Nor does the Act allow the State or physicians to ignore an advance directive and keep a person alive to harvest their organs for the benefit of their children or others. Other Idaho statutes, in fact, protect individual autonomy even *at the expense of* others. For example, Idahoans, *even after death*, cannot be forced to donate their organs to save another's life. I.C. § 39-3407(4). Nor can Idaho parents be criminally prosecuted for allowing their children to die rather than seek medical intervention that is contrary to their religious beliefs. I.C. §§ 18-1501(4) and 18-401(2). Idaho's decision in other circumstances to prioritize individual autonomy over saving lives of those already born undermines the State's claim that its interest in the Pregnancy Exclusion is compelling.[18] These are not mere idiosyncrasies in Idaho law—they are evidence that Idaho's justification for the Pregnancy Exclusion is constitutionally insufficient.

4. The Pregnancy Exclusion Is Unconstitutional Because It Is Not Narrowly Tailored.

Strict scrutiny demands that laws that violate fundamental rights be "narrowly tailored" to further a compelling interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Accordingly, even a court that held that a state interest in potential life could potentially overcome the right to medical decision-making insisted that any such intrusion be narrowly tailored. *See, e.g., Burton*, 49 So.3d at 266. But the Pregnancy Exclusion is not even close to narrowly tailored. It overrides

[18] Justice Brennan made a similar observation about the state's purported interest in *Cruzan*, 497 U.S. at 314, n.15 (Brennan, J., 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 needed medical care, nor did it provide state insurance to underwrite such care. But Missouri did have a living will statute that specifically encouraged the pre-planned termination of life, and did not require court review of every decision to withhold or withdraw life support an incompetent patient. Thus, Justice Brennan reasoned, Missouri's interest in life was not so unqualified after all.

the advance directives of all pregnant people, regardless of what they specify, and regardless of any medical determination of whether the pregnancy could possibly be brought to term and lead to a live birth. This is the antithesis of the narrow tailoring strict scrutiny demands.

And, while there may be an exceptionally rare scenario in which the State's interest would be so compelling as to override a terminal patient's fundamental liberty interest, pregnancy itself is not such a circumstance. As the court observed in *In re A.C.*, a scenario in which a medical procedure against the will of a pregnant person or their surrogate decision-maker to benefit a fetus would be legally justifiable is so "extremely rare and truly exceptional" that not even the situation at bar—in which the patient's death was imminent—qualified. *In re A.C.*, 573 A.2d at 1252.

Rather than attempting to identify the rare case in which state intervention may be permissible, however, the Pregnancy Exclusion wholly eliminates Plaintiffs' rights to make enforceable advance directives. I.C. § 39-4510. The statute entirely deprives Plaintiffs of their constitutional right to decide what can be done to their bodies, including, perversely, their right to direct that, if pregnant and incapacitated, they receive treatment that might benefit the fetus they carry—a decision that would, in fact, serve the State's claimed interest. It does so regardless of Plaintiffs' moral beliefs, family circumstances, gestational phase, or any other determination that is within the human dignity—and constitutional purview—of Plaintiffs to decide.

C. The Act Fails to Provide Any Procedural Due Process Whatsoever.

Where the State proposes to deprive individuals 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, J., 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 in violation of the due process clause of the Fourteenth Amendment.

D. The Pregnancy Exclusion Is Unconstitutional Because It Denies Plaintiffs the Equal Protection of the Law.

The Fourteenth Amendment provides that no person shall be denied the equal protection of the law. U.S. Const. amend. XIV, § 1. Courts analyze equal protection claims 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. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)). Singling out a class of people for differential treatment is a serious constitutional harm, because it "perpetuat[es] 'archaic and stereotypic notions' or . . . stigmatiz[es] 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, 739-40 (1984); *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).

The Pregnancy Exclusion imposes precisely this harm, and more, on Plaintiffs by violating their rights to equal treatment under the law in two distinct ways. First, Plaintiffs' rights to equality are violated by the Pregnancy Exclusion because it diminishes and potentially nullifies their advance directives on the basis of gender, in service of no exceedingly persuasive reason that is not grounded in overbroad generalizations about gender roles and expectations. Second, Plaintiffs' right to Equal Protection is violated because they are singled out for burdens on their fundamental right to bodily integrity that other people do not face, a burden that, as explained in the preceding section, is neither justified by a compelling state interest nor narrowly-tailored to effectuate such an interest.

1. The Pregnancy Exclusion Discriminates Against Plaintiffs on the Basis of Gender in Violation of the Equal Protection Clause.

But for their capacity for pregnancy, Plaintiffs would share the same rights as male

Idahoans to make legally-recognized advance directives that instruct physicians, family members, and the courts to carry out Plaintiffs' decisions to refuse or continue medical treatment in the event they became incapacitated. Yet because of their capacity to become pregnant, the Act renders their advance directives meaningless, no matter the circumstances. Perversely, the Act also prevents them from planning for the medical treatment they would actually want—not only refuse—in case of pregnancy. The fact that their advance directives, unlike those of their male counterparts, are contingent and potentially unenforceable, is gender-based discrimination that violates the Fourteenth Amendment's Equal Protection Clause.

"Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where. . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about… men and women." *J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 130-31 (1994) (holding that peremptory challenges exercised on the basis of gender violate the Equal Protection Clause). Sex classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *United States* v. *Virginia*, 518 U.S. 515, 534 (1996) (holding that the Virginia Military Institute violated women's equal protection rights by refusing to admit them as students).

Rather than allowing archaic notions of gender roles to justify discrimination, a gender-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. *Sessions* v. *Morales-Santana*, 198 L. Ed. 2d 150, 163 (2017) (citing *United States* v. *Virginia*, 518 U.S. at 533) (striking down immigration rule that granted preference to children of unmarried women but denied that preference to children of unmarried men); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976) (holding that a law that allowed women over 18 to purchase beer, but required men to be over age 21, violated equal protection); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (Air Force violated equal protection rights by refusing to recognize female lieutenant's husband as her dependent). Importantly, the differential treatment "must substantially serve an important governmental interest *today*, for "in interpreting the [e]qual

[p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged." *Morales-Santana*, 198 L. Ed. 2d at 163 (citing *Obergefell* v. *Hodges*, 576 U.S. 644, 673 (2015)) (emphasis in original).

Idaho's Pregnancy Exclusion is based on precisely such obsolete gender stereotypes. Implicit in the Act are both the archaic view that women lack the moral agency to make complex ethical decisions, and the long-rejected notion that motherhood is woman's natural role. *See, e.g.*, *J.E.B.*, 511 U.S. at 130-31 (rejecting the reasoning of prior decisions upholding the exclusion of women from juries and from the practice of law). By preventing people from deciding whether they would, or would not, want their bodies to be kept on life support, Idaho is asserting that its claimed interest in fetuses being gestated as long as possible overrides Plaintiffs' decisional and bodily autonomy.[19] This not only results in stigmatic harm, but also puts Plaintiffs at a legal disadvantage by virtue of their gender, in violation of the Equal Protection Clause. *See, e.g.*, *Frontiero*, 411 U.S. at 686-87 ("[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.").[20]

2. The Pregnancy Exclusion Does Not Survive Intermediate Scrutiny.

a. Preventing Plaintiffs from Creating Enforceable Directives Serves No Important State Objective.

This potentially devasting incursion into Plaintiffs' constitutionally-protected rights does not serve an "important" government objective. The *only* objective Idaho has proffered is a claimed interest in the protection of potential life. But this interest fails in multiple ways.

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

[20] The legal disadvantage is not theoretical. In a time of global pandemic, when more than 300,000 people in the U.S. have died from COVID-19, when those who are severely ill with COVID-19 are at heightened risk of interventions that render communication impossible, and the ability of family members to be present to advocate for those who are ill is restricted to prevent contagion, it is even more critical to Plaintiffs that their medical decisions be accorded the same respect as those of men.

First, the U.S. Supreme Court has never held that a state's claimed interest in potential life, which is sufficient for the purposes of limited regulations on abortion, jumps the confines of that jurisprudence to allow *subordinatio*n of the rights of women of childbearing age. To put it plainly, the Court has never held that such an interest allows a state to use the body of an incapacitated person to incubate a fetus, without that incapacitated person's consent. In fact, the Court's abortion jurisprudence has "sensibly been relied upon to counter" such incursions into individual rights. *Casey*, 505 U.S. at 859 (listing cases in which courts relied on such jurisprudence to strike down state efforts to coerce a young person to have an abortion and to induce unwanted sterilization, and to support the right to refuse medical treatment).

Second, even if Plaintiffs were incapacitated during pregnancy, the State has not—and cannot—prove that its interest in keeping them on life support to gestate a fetus actually serves its claimed interest in potential life. After all, the science to date indicates that in most cases when a pregnant woman requires life support during her pregnancy, the pregnancy is not sustained to term.[21] To recast what the State is demanding more accurately, it is that Plaintiffs' right to medical decision-making is diminished now because they have the capacity for pregnancy, and will be eliminated if they become pregnant and are incapacitated. Moreover, the Pregnancy Exclusion invalidates Plaintiffs' advance directives in their entirety, even if they instruct medical personnel to *provide* care that would promote the continuation of their pregnancy, as two of the Plaintiffs have. Thus, the Act does not serve an interest in "potential life," but rather medical experimentation. As is well established, experimenting on people without their consent is both morally and legally wrong.[22]

In sum, the Supreme Court has never recognized such a sweeping invalidation of

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[21] Majid Esmaeilzadeh et al., *One Life Ends, Another Begins: Management of a Brain-Dead Pregnant Mother — A Systematic Review*, 8 (74) BMC Med 1, 1 (2010) (reviewing medical literature to find 30 cases of pregnant women placed on life support after brain death between 1982 and 2010, of which only 12 ended with the delivery of surviving infants).

[22] *See* American College of Obstetrics & Gynecology ("ACOG"), *Committee Opinion No. 439: Informed Consent* 114 (2 pt.1) Obstetrics & Gynecology 401, 402 (Aug. 2009) ("Informed consent for medical treatment and for participation in medical research is both a legal and an ethical matter.").

individual rights based on a state's asserted interest in fetal life, nor is that interest served by the Pregnancy Exclusion.

b. The Pregnancy Exclusion Is Not Substantially Related to Idaho's Only Claimed Reason for the Law.

Even if the State could demonstrate (as is its burden)[23] that its interest in potential life is an "important governmental objective" in this context, it cannot demonstrate that a wholesale invalidation of the advance directives of Plaintiffs and other women of childbearing age is "substantially related" to the achievement of that objective. *See, e.g., Craig v. Boren*, 429 U.S. at 200 (in striking down beer sale law, Court held that law's gender classification was not substantially related to asserted interest in public health and safety). Rather, the Pregnancy Exclusion diminishes the directives of Plaintiffs *now* regardless of whether they are pregnant, and nullifies them *in the future* if they were to become pregnant, regardless of individual health circumstances, such as the progression of the pregnancy, the viability of the fetus, or the needs of the pregnant woman. It cuts far too wide a swath in its effort to address an interest that is unlikely to affect the vast majority of Idahoans with advance directives. *See, e.g., Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 804-05 (10th Cir. 2019) (ban on women being topless in public was "unnecessary and overbroad means to maintain public order and promote traffic safety 'when more accurate and impartial lines can be drawn.'") (citing *Morales-Santana*, 198 L. Ed. 2d at 166, n.13).

3. The Pregnancy Exclusion Violates Plaintiffs' Rights to Equality Under the Law Because It Burdens Their Fundamental Right to Self-Determination.

Finally, the nature of the decision at issue—the fundamental right to consent to or refuse medical treatment—also renders the Pregnancy Exclusion unconstitutional as applied to Plaintiffs. A law that singles out a group of people for unique burdens on a fundamental right is

[23] *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) ("'The burden of justification' the state shoulders under this intermediate level of scrutiny is 'demanding': the state must convince the reviewing court that the law's 'proffered justification' for the gender classification 'is exceedingly persuasive.'") (citing *Virginia*, 518 U.S. at 533).

unconstitutional under the Equal Protection Clause "unless shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). As explained in section B, supra, the Pregnancy Exclusion's burden on the fundamental right to medical decision-making cannot survive strict scrutiny, as it neither serves the State's asserted interest, nor is it narrowly-tailored. Thus, even if Defendants could justify the Pregnancy Exclusion's gender-based discrimination by demonstrating that it was substantially-related to an important government objection (which they cannot do), the Pregnancy Exclusion is nonetheless an unconstitutional infringement of Plaintiffs' rights to Equal Protection because it burdens their fundamental right to consent to or refuse medical treatment.

V. CONCLUSION

The Pregnancy Exclusion violates Plaintiffs' constitutional rights. It does so now by compelling them to make statements contrary to their beliefs and desires for medical care in the event that they become pregnant, in violation of their right to free speech, and by making their medical decisions contingent, in violation of their Fourteenth Amendment rights to substantive and procedural due process. It does so in the future by potentially nullifying their directives and voiding their right to autonomously decide what medical procedures they will request or decline, in violation of the same Fourteenth Amendment rights. And this burden is imposed only upon women, violating Plaintiffs' rights to be free from legal subordination based on their sex.

The single interest asserted by the State — protection of potential life — is insufficient to justify these violations of Plaintiffs' fundamental rights. The asserted interest is not in fact advanced by the Pregnancy Exclusion, which is an impermissible wholesale override of Plaintiffs' decision-making. Thus, the State cannot meet its burden to prove that the Pregnancy Exclusion gives the constitutionally-mandated deference to the rights at stake.

The parties agree to the material facts. Plaintiffs are entitled, as a matter of law, to judgment that the Pregnancy Exclusion is unconstitutional under the First and Fourteenth Amendments as applied to Plaintiffs, and a facially unconstitutional violation of the First Amendment right to freedom of expression.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2020, 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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