UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-1243

THE SATANIC TEMPLE Plaintiff-Appellant v.	Appeal from the United States District Court for Idaho
RAUL LABRADOR et al Defendants-Appellees	No. 1:22-cv-00411-DCN David C. Nye, *Judge*

PLAINTIFF-APPELLANT'S BRIEF

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I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction over the action being appealed pursuant to 28 U.S.C. § 1331 because it was a civil action arising under the Constitution and laws of the United States. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because an appeal was timely taken on February 29, 2024, from a final order dismissing the action entered on January 31, 2024. Excerpts of the Record ("ER") 3, 109.

II. STATEMENT OF ISSUES

Does a woman have a Constitutional right to decide whether she will have children?

Does a woman have a Constitutional right to engage in sex using birth control and solely for the purposes of pleasure and intimacy ("Protected Sex")?

Does a woman who engages in Protected Sex and becomes pregnant by accident consent to being pregnant?

Does a woman who becomes pregnant without her consent have a property right to remove an unwanted fetus from her uterus?

Does the State of Idaho take a woman's property if it makes the removal of an unwanted fetus from her uterus a crime?

Does the State of Idaho violate the Thirteenth Amendment if it forces a woman who becomes pregnant without her consent to carry an unwanted fetus to term?

Does the provider of medical abortions by telemedicine have standing to challenge the constitutionality of an abortion law in another state?

Does a religious organization that creates an abortion clinic to promote its religious beliefs have standing to challenge an abortion law that restricts the exercise of those religious beliefs?

Can an association use government statistics to identify its members for standing purposes?

III. STATEMENT OF THE CASE

A. Facts

Plaintiff-Appellant The Satanic Temple ("TST") is a Massachusetts non-profit corporation organized as a religious institution. Its mission is to promote the beliefs, ideals, and tenets of TST, provide mutual support for TST members, hold religious services and do community outreach. TST venerates, but does not worship, the

allegorical Satan described in Milton's epic poem Paradise Lost - the defender of personal sovereignty against the dictates of religious authority. ER 85-87.

TST members adhere to seven tenets (the "TST Tenets") commonly associated with secular humanism including the belief that one's body is inviolable, subject to one's own will alone. TST members do not believe a human being comes into existence at conception. They believe an unwanted pregnancy must be aborted. ER 89.

TST promotes the TST Tenets with a variety of programs, including, but not limited to, education and protecting the exercise of TST Tenets from government intrusion. One of those programs is promoting the Satanic Abortion Ritual, a meditation that alleviates guilt and shame that may be experienced by a woman who gets an abortion. ER 66, 68, 104-108.

Idaho banned abortion immediately after *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __, 142 S. Ct. 2288 (2022) ("*Dobbs*"). Idaho Code § 18-622(2) ("Every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony."); Idaho Code §

18-8804(1) ("A person may not perform an abortion on a pregnant woman when a fetal heartbeat has been detected.") (collectively the "Idaho Abortion Bans"). The Idaho Abortion Bans are premised on the legislative finding that a human being comes into existence at conception. Idaho Code § 18-8802(1) ("The life of each human being begins at fertilization.").

In response, TST spent over $100,000 to create a clinic that provides medical abortions by telemedicine (the "Clinic").[1] TST decided the effective promotion of the TST Tenets in general and the Satanic Abortion Ritual in particular requires making abortifacients readily available to TST members by telemedicine. ER 68.

Creating the Clinic was the first step in that effort. The Clinic currently serves New Mexico residents and is provocatively named "Samuel Alito's Mom's Satanic Abortion Clinic."[2] ER 68.

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[1] The Clinic provides free abortions to anyone who participates in the Satanic Abortion Ritual. Patients pay only for the abortifacients – about $90. https://www.tsthealth.org/about, last visited January 22, 2024.

[2] https://thesatanictemple.com/pages/samuel-alitos-moms-satanic-abortion-clinic, last visited June 26, 2024.

Prior to opening the Clinic, TST's programs were focused on education and advocacy, not the practice of medicine. The creation of the Clinic diverted TST resources from TST's other educational and advocacy programs. ER 89.

The Clinic was designed to make abortifacients readily available throughout the country to the fullest extent possible permitted by the Risk Evaluation and Mitigation Strategy ("REMS") Program established by the U.S. Food and Drug Administration ("FDA") for abortifacients. ER 69. The Clinic is able to deliver its services in Idaho with the minimal expenditure of time and money. ER 69.

The Clinic uses telemedicine and Advanced Registered Nurse Practitioners ("APRN's") to prescribe and deliver abortifacients in accordance with REMS (the "Telemedicine Model").[3] The Telemedicine Model relies on Zoom and other video technologies for a consultation between the patient and APRN.[4] Abortifacients are delivered by U.S.

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[3] See www.tsthealth.org, last visited June 24, 2024.

[4] APRN's are "healthcare providers" authorized by REMS to prescribe abortifacients using telemedicine.

Mail in three to five days after a consultation and can be delivered overnight if the patient pays the additional postage.

The Clinic would provide medical abortions to TST members in Idaho if it could do so lawfully.[5] But the Clinic does not because its staff would be subject to criminal penalties, regardless of whether they are APRN's, physicians or licensed in Idaho. Idaho Code §§ 18-605(1) and 18-622. ER 69.

The Complaint describes in detail the reproductive process from insemination to birth. ER 92-94. The fertilization of a woman's egg by a man's sperm creates a zygote; a single cell that contains all of the DNA necessary to become an adult human being. ER 92. Idaho law defines the zygote with a variety of terms, including "human being," "an individual organism of the species Homo sapiens," and "preborn child." Idaho Code §§ 18-604(5), 18-8802(1) and 18-8802(8) (collectively a "Prenatal Person").

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[5] There are dozens of TST women in Idaho who get pregnant each year due to the failure of their birth control and would, in the exercise of their religious beliefs, get an abortion. ER 81.

The legislative creation of a Prenatal Person gives a zygote legal protection from destruction except when it is created by rape, or its destruction is necessary to keep the mother alive. Idaho Code § 18-622(3). The zygote has a legal existence in its own right separate and apart from the mother. Idaho Code § 18-8802(8) (Prenatal Person is "a precious and unique life, one that is independent and distinct from the mother's."). The creation of a Prenatal Person by legislative fiat means that one person (the mother) carries another person (a Prenatal Person) inside her body from the moment a zygote is created until birth. The mother goes to jail if she has a Prenatal Person removed from her uterus by abortion. Idaho Code § 18-606(2) ("Every woman who knowingly submits to an abortion . . . shall be deemed guilty of a felony.").

The Idaho Abortion Bans do not apply to the zygote prior to its implantation in the uterus. Idaho Code §§ 18-604(1) and 18-8801(1). But once the zygote grows into a multi-cell structure known as a blastocyst and implants in the endometrium layer of the uterus, its removal by abortion becomes a crime in Idaho. That legal protection for the blastocyst and its subsequent stages continues up until birth.

The Idaho Abortion Bans compel a mother to provide a Prenatal Person with the use and occupancy of her uterus and all of the oxygen, nutrients, protection and labor necessary for birth. ER. 98. The only way a mother can avoid that compulsion is if she consents to the pregnancy, was raped, her doctor determines she will be killed by her pregnancy, or she obtains an abortion outside Idaho.

B. Procedural History

TST filed its complaint on September 30, 2022, naming the Governor and Attorney General of Idaho as Defendants in an action pursuant to 42 U.S.C. § 1983. On December 13, 2022, TST filed an amended complaint pursuant to Fed. R. Civ. Pro. 15(a)(1)(B) which removed the Governor as a Defendant and added Defendant Jan M. Bennetts in her capacity as Ada County prosecutor.

The Complaint alleges the Idaho Abortion Bans are unconstitutional as applied to TST members who become pregnant without their consent due to the failure of their birth control ("Involuntarily Pregnant Women"). ER 88. The Complaint alleges a Prenatal Person carried by an Involuntarily Pregnant Woman is created and carried without the mother's consent. ER 88, 92, 93, 100.

The Complaint alleges Involuntarily Pregnant Women have a property interest in their uterus – the power to exclude or remove an unwanted Prenatal Person. ER. 96-97.

The Complaint alleges the Idaho Abortion Bans make it impossible for an Involuntarily Pregnant Woman to lawfully remove an unwanted Prenatal Person from her uterus, thereby taking her property without her consent. ER 97. The State of Idaho pays nothing to an Involuntarily Pregnant Woman for its conscription of her uterus.[6] The Complaint therefore alleges in Count One the Idaho Abortion Bans cause an unconstitutional taking of an Involuntarily Pregnant Woman's property – the use and occupancy of her uterus – without the just compensation required by the Takings Clause (the "Takings Claim"). ER 96-97.

The Complaint alleges in Count Two an Involuntarily Pregnant Woman provides a Prenatal Person with all of the services and labor necessary to bring it to term, including hormones, oxygen, nutrients,

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[6] An Idaho gestational surrogate receives between $55,000 and $60,000 for use of her uterus to incubate a Prenatal Person created from the egg of a third party. https://reproductivepossibilities.com/become-a-surrogate-mother/become-a-surrogate-idaho/, last visited June 16, 2024.

antibodies and the physical labor of delivery. The Complaint alleges the Idaho Abortion Bans therefore place an Involuntarily Pregnant Woman into involuntary servitude to the Prenatal Person in violation of the Thirteenth Amendment (the "Involuntary Servitude Claim"). ER 98-99.

Count Three of the Complaint alleges women have a fundamental liberty interest to engage in Protected Sex. ER 99. The Complaint alleges the Idaho Abortion Bans violate the Equal Protection Clause by discriminating between women who are pregnant by accident due to the failure of their birth control and those who are pregnant by rape. ER 100. The Complaint alleges the exemption of rape victims from the Idaho Abortion Bans infringes upon the fundamental right of Involuntarily Pregnant Women to engage in Protected Sex. ER 100. Involuntarily Pregnant Women are forced to pay the physical, emotional, and financial costs of carrying an unwanted Prenatal Person to term without their consent while women who report they are

impregnated by rape are not (the "Equal Protection Claim").[7] ER 99-100.

The Complaint does not seek to invalidate the Idaho abortion scheme in its entirety. Rather, TST seeks to enjoin the enforcement of the Idaho Abortion Bans against 1) anyone who provides an abortion to an Involuntarily Pregnant Woman; and 2) the Clinic if it prescribes and delivers abortifacients using the Telemedicine Model to TST members in Idaho. ER 102.

Defendants-Appellees Defendants Raul Labrador, Jan Bennetts, and the State of Idaho (collectively the "Idaho Defendants") moved to dismiss the Complaint pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(b)(6), arguing TST failed to state a claim and did not have standing to challenge the constitutionality of the Idaho Abortion Bans. ER 5.

In opposition, TST submitted the declaration of Erin Helian, the Executive Director of the Clinic, who described the Clinic's history, the

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[7] The Complaint also alleged the Idaho Abortion Bans violate Idaho Exercise of Religious Freedom Act, Idaho Code § 73-401 et seq. Complaint at Count Four. ER 101-102. TST consented to the dismissal of Count Four and asked for leave to replead it as a violation of the Free Exercise Clause. ER 27, 33.

Telemedicine Model and stated there are about 1,750 female TST members in Idaho of childbearing age. ER 65-70.

TST also submitted the declaration of Dr. J.D. (the "Dr. J.D. Opinion").[8] ER 79-81. Dr. J.D. opined there are, to a reasonable degree of medical probability, twenty-seven (27) of TST members in Idaho who are Involuntarily Pregnant Women during the course of a year. Dr. J.D.'s Opinion was based on the number of female TST members in Idaho of childbearing age (1,750) and the application of statistics reported by the State of Idaho, the National Institute of Health and the Centers for Disease Control and Prevention for pregnancy, abortion and birth control. ER 79-81

TST argued it had standing to challenge the Idaho Abortion Bans 1) as an abortion provider; 2) as a religious organization that had to divert its resources to open the Clinic; and 3) as an association representing Involuntarily Pregnant Women in Idaho. See Plaintiff's

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[8] Dr. J.D. holds a Doctorate in Osteopathy, is licensed in multiple states and has fifteen (15) years' experience as an obstetrics and gynecological specialist. Dr. J.D. is a Fellow in The American Congress of Obstetricians and Gynecologists. ER 79. Dr. J.D.'s identity is confidential pursuant to stipulation. ER 82-85

Memorandum in Opposition to Defendants' Motion to Dismiss, filed May 4, 2023, at pp. 8 to 15, ECF No. 30.

A hearing was held on December 6, 2023. ER 30-64. On January 31, 2024, the District Court granted the motion pursuant to Fed. R. Civ. Pro. 12(b)(1) dismissing for lack of jurisdiction and, in the alternative, the motion pursuant to Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim. ER 4-29. This appeal was timely filed on February 29, 2024. ER 109.

1. The District Court Ruled the Idaho Abortion Bans are Constitutional Under *Dobbs.*

The District Court "framed" this case through the "lens" that "[t[he challenged regulations here deal with abortion." ER 10. The District Court held "Defendants are not regulating sex and pregnancy; they are regulating abortion. And they are doing so legally under *Dobbs*." ER 24.

2. The District Court Ruled Women Who Engage in Protected Sex Consent to Being Pregnant.

The District Court "struggled" with the undisputed fact that a woman does not actually consent to becoming pregnant by engaging in

Protected Sex. The District Court said, "it is not affirmatively saying that 'consent to sex is consent to pregnancy.'" ER 23.

The District Court said Involuntarily Pregnant Women "have the technological means, medicine, and knowledge necessary to engage in sex that does not result in pregnancy." ER 24. It is undisputed sterilization by hysterectomy is the *only* method of birth control that is 100% effective. ER 80-81.

The District Court found that pregnancy is a "plausible" and "often expected consequence of having sex" (the "Consequence of Sex Ruling"). ER 23. The District Court applied the Consequence of Sex Ruling to hold "women who conceive children through consensual sex do not suffer the very essence of involuntary servitude outlawed by the Thirteenth Amendment." ER 24.

3. The District Court Dismissed the Takings Claim on the Grounds a Uterus is Not Property Protected by the Takings Clause.

The District Court ruled an Involuntarily Pregnant Woman's power to exclude or remove an unwanted Prenatal Person from her uterus is not a property interest protected by the Takings Clause. ER 22. The Court called this an "interesting argument [but] not legally

sound." ES 20. The District Court did not address the fact that women in Idaho have, for many years, been renting out the use of their uteruses to third parties as gestational carriers pursuant to enforceable contracts.

Citing *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2022), the District Court said the property interests protected by the Takings Clause "draw on existing rules or understandings about property rights." The District Court held existing rules and understandings do not support a woman's power to exclude or remove an unwanted Prenatal Person from her uterus because "there is no persuasive authority suggesting a woman's uterus is property subject to the same considerations and economic uses other traditionally understood property holds." ER 21-22.

The District Court noted "the Anglo-American legal tradition has consistently viewed abortion as a crime – not as a property interest." ER 21. Citing Blackstone's Commentaries, the District Court said:

> The common law viewed life as the immediate gift of God, a right inherent in every individual. If the common law recognized any property rights in this area, it was the property rights of the unborn child. A child still in the womb could have a legal guardian and could receive an estate.

ER 21.

The District Court held "[t]here is no right to an abortion under the constitution, let alone a right to do so vis-à-vis the Takings Clause." ER 22.

4. The District Court Dismissed the Involuntary Servitude Claim on the Grounds Consensual Sex is Constructive Consent to Pregnancy.

The District Court said the Involuntary Servitude Claim, "border[s] on the offensive" and "to say a woman has not 'consented' to getting pregnant after undertaking an act this is fully capable of bringing about that exact result is somewhat disingenuous." ER 23. The District Court professed that it was not "affirmatively saying that consent to sex is consent to pregnancy" but nonetheless described an Involuntarily Pregnant Woman as "a person who becomes pregnant by accident – a consensual act, albeit with an unintended result." ER 24.

The District Court ruled "the whole of humanity understands pregnancy is a potential, natural, understood, and often expected consequence of having sex." ER 23. The District Court said:

> Women who conceive children through consensual sex do not suffer "the very essence of involuntary servitude outlawed by the Thirteenth Amendment." Dkt. 30 at 28. TST's argument here goes too far. Were the Court to take this logic to its end,

> it could find that any obligations the law imposes on parents for the support and upbringing of a child would constitute involuntary servitude and justify the termination of the child. Such a result is blatantly absurd.
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> ER 24.

5. The District Court Dismissed the Equal Protection Claim.

The District Court dismissed the Equal Protection Claim for three reasons. The first was that the Idaho Abortion Bans do not infringe on a woman's fundamental liberty interest to engage in Protected Sex because "the regulations at issue do not focus on sex: the regulations focus on abortion and there is no fundamental right to an abortion." ER 26.

The second reason was that Involuntarily Pregnant Women "are not a protected class." As the District Court noted, TST never alleged they were. ER. 26.

The third reason was the Idaho Abortion Bans are "narrowly tailored to [Idaho's] compelling interests in preventing abortions and protecting the victims of criminal conduct. That those two interests overlap (and 'leave out' TST members) is not a violation of equal protection, but the reality of living in a pluralistic society." ER 26.

6. The District Court Held TST Does Not Have Standing as an Abortion Provider on the Grounds the Causal Chain for Injury is Too Weak and Potential Redress Too Attenuated.

The District Court ruled TST does not have standing as a provider of abortions because it "has not identified any actual women in Idaho who wish to use the Clinic's services to obtain abortifacients... Without such a person, [TST] has not actually suffered any concrete injury." ER 15. The District Court held that to establish actual injury, TST must show:

> (1) TST's providers become licensed in Idaho— a necessary step that neither TST nor any of its declarants allege is underway or even planned; (2) a TST member in Idaho becomes "involuntarily pregnant" due to failed birth control; (3) that member chooses to abort her child; and (4) that member selects the Clinic to help perform the abortion, rather than some other abortion provider.
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> ER 16-17.

Citing *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F3d 849, 867 (9th Cir. 2012), the District Court said:

> Because this "causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries," it is "too weak to support standing."
>
> ER 17.

The District Court said:

> [W]hile injunctive relief could potentially redress the purely hypothetical injuries TST claims to have sustained, the Court has already concluded that no such injury actually exists, and even if it did, that the causal link between it and Defendants' actions is too attenuated to support standing. Thus, TST has a redressability problem as well.

ER 17.

The District Court rejected TST's claim it faced prosecution for providing medical abortions in Idaho:

> [F]ear of prosecution based upon intentions that may or may not materialize is not enough to establish standing because there is no injury. See [*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992)] (explaining that "someday intentions—without any description of concrete plans, or indeed even any specification of when the someday will be—do not support a finding of the actual or imminent injury.")

ER 16.

7. The District Court Held TST Does Not Have Standing as a Religious Organization on the Grounds Spending Money in New Mexico on the Clinic is Not an Injury for Purposes of Standing.

Citing *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) ("*Lake Forest*"), the District Court ruled:

> TST opened its Clinic to do precisely what Idaho law forbids, creating a problem that otherwise would not affect Plaintiff at all. . . Idaho did not cause the alleged injury and, even if it

> did, the relief requested will not redress it. . . . [W]hatever happens in Idaho will not make or break the Clinic.
>
> ER 16.

8. The District Court Held TST Does Not Have Standing as An Association on the Grounds TST Has Not Identified Any TST Member Injured by the Idaho Abortion Bans.

TST presented the Dr. J.D. Opinion to show there are twenty-seven (27) members of TST in Idaho who are Involuntarily Pregnant Women during the course of the year. Dr. J.D. started with the undisputed fact there are 1,750 TST members who are women of childbearing age in Idaho. Dr. J.D. applied to that number the statistics reported by the State of Idaho for fertility on an annual basis (60.7 per 1,000 women of childbearing age) and abortion on an annual basis (5.4 per 1,000 women of childbearing age) to opine there are 115 pregnant TST members during the course of a year. Dr. J.D. then applied the annual rate for unintended pregnancies reported by the Centers for Disease Control and Prevention (50%) and concluded 58 of those women have an unintended pregnancy during the course of the year. Dr. J.D. then applied the rate for unintended pregnancies caused by a failure of birth control reported by the National Institute Health (48%) and opined that twenty-seven (27) TST members will, during the

course of the year, have an unintended pregnancy caused by a failure of birth control, i.e., be Involuntarily Pregnant Women. ER 79-81.

The District Court rejected the Dr. J.D. Opinion as speculation "based upon statistics and probabilities *that may or may not be accurate*. TST has not verified *any* of the data in a real-life setting to determine if any actual women fall into any specific category." [emphasis in original]. ER 14. The District Court did not conduct a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("*Daubert*") to reach this conclusion. Instead, the District Court ruled TST had not shown any of its members in Idaho were Involuntarily Pregnant Women and thus TST had no standing as an association to represent them. ER 15.

IV. SUMMARY OF ARGUMENT

All women have a fundamental liberty interest to decide whether they will have children. All women also have a fundamental liberty interest to engage in Protected Sex. Neither of these fundamental rights was curtailed by *Dobbs*. 142 S.Ct. at 2277.

A woman does not waive one constitutional right by the exercise of another constitutional right. By exercising the fundamental right to

engage in Protected Sex, a woman does not waive her fundamental right to decide whether she will have children. Assuming the risk of pregnancy is not – as a matter of law – actual consent to becoming pregnant. Therefore, an Involuntarily Pregnant Woman does not actually consent to being pregnant.

A woman has a property interest in her uterus to exclude or remove an unwanted Prenatal Person. The Idaho Abortion Bans make the removal of an unwanted Prenatal Person from the uterus of an Involuntarily Pregnant Woman a crime in Idaho. The Idaho Abortion Bans deprive an Involuntarily Pregnant Woman of her property without just compensation in violation of the Takings Clause.

The Idaho Abortion Bans compel an Involuntarily Pregnant Woman to provide the services and labor necessary to bring a Prenatal Person to term. She has no meaningful choice to opt out. Therefore, the Idaho Abortion Bans force an Involuntarily Pregnant Woman into involuntary servitude in violation of the Thirteenth Amendment.

Women who are pregnant without their consent due to rape are exempt from the Idaho Abortion Bans while Involuntarily Pregnant Women are not (the "Rape Exemption"). The Rape Exemption unduly

burdens a woman's exercise of her fundamental right to engage in Protected Sex. She is forced to pay the physical, emotional, and financial costs of being pregnant without her consent while a victim of rape is not. This discrimination among and between pregnant women based on the exercise of a fundamental right is not narrowly tailored to service a compelling state interest. It therefore violates the Equal Protection Clause.

TST has standing to challenge the constitutionality of the Idaho Abortion Bans because 1) TST commits a crime if it provides medical abortions to TST members in Idaho by telemedicine; 2) the Idaho Abortion Bans compromise TST's mission to promote The Satanic Abortion Ritual in Idaho by education and caused TST to divert its resources to promote The Satanic Abortion Ritual using the Clinic; and 3) TST, as an association, represents the interests of Involuntarily Pregnant Women in Idaho.

V. ARGUMENT

A. The District Court's Decision is Reviewed *De Novo*.

"An order granting a motion to dismiss is reviewed *de novo*." *Alexander v. United States*, 787 F.2d 1349, 1350 (9th Cir. 1986). "Questions of standing are also reviewed de novo, but underlying factual findings are reviewed for clear error." *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) ("*McCormack*").

B. *Dobbs* Does Not Apply to Events That Occur Prior to a Woman's Decision to Get an Abortion.

The District Court framed this case as being about abortion, not sex, and concluded the Idaho Abortion Bans "do not discuss [or burden] the right to engage in private sexual activities in any way." ER 9. As the District Court noted "the way in which this case is 'framed' makes a difference in the outcome." ER 9. By viewing this case through the "lens" of abortion, the District Court ruled, in error, the Idaho Abortion Bans are constitutional under *Dobbs*. ER 24.

The District Court's "lens" is myopic because it focuses only on the point in time when a woman decides whether to get an abortion. *Dobbs* held that decision is not a fundamental privacy right protected by the

Due Process Clause and the State of Idaho may therefore regulate it applying the rational basis standard. *Dobbs*, 142 S. Ct. at 2283.

But as alleged in the Complaint, there are a number of highly relevant events that occur *before* a woman faces the decision whether to get an abortion, none of which were addressed by *Dobbs*.

The first event is the act of sexual intercourse. ER 92. The Consequence of Sex Ruling means, erroneously, any woman who consents to having sex also consents to getting pregnant. ER 23. *See*, discussion *supra* at Section V.C.2. *Dobbs* never addressed this issue.

The next event is the fertilization of an egg to create a zygote. ER 92. The State of Idaho has declared by legislative fiat a zygote in Idaho is a Prenatal Person. Where once there was one person, now there are two. One person (the mother) carries the other (the Prenatal Person) inside her body.

Dobbs left the "personhood" of a zygote to the political process. *Dobbs*, 142 S.Ct. at 2243. *Dobbs* did not address whether or to what extent conferring personhood on a zygote complies with or violates the Takings Clause, the Involuntary Servitude Clause or the Equal Protection Clause.

The next event is the true focus of this action – the attachment of the Prenatal Person to the endometrium of the uterus. ER 93. It is this event that is basis for all of TST's claims. Attachment occurs without a woman's knowledge. ER 93. Therefore, whether attachment occurs with a woman's consent cannot be determined on a motion to dismiss. *See,* discussion *supra* at Section V.C.1. *Dobbs* did not address or consider any of the legal implications of a Prenatal Person implanting in the body of another person without their knowledge or consent.

Abortion, by definition, requires that a woman know she is pregnant. *Dobbs* enables the State to regulate her decision to act on that knowledge. Thus, when the Supreme Court said in *Dobbs* "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision," it assumed a woman knew she was pregnant. 142 S. Ct. at 2242.

The Constitutional protections of the Takings Clause and Involuntary Servitude Clause apply at the moment a Prenatal Person implants in the uterus – weeks if not months before a woman knows it

happened.[9] The District Court erred when it interpreted *Dobbs* to mean pregnant women cannot look to the Takings Clause or Thirteenth Amendment to protect their bodies from conscription by the State of Idaho. ER 22. *Dobbs* is silent on that point because a Prenatal Person implants in the uterus many weeks *before* the decision regulated by *Dobbs* presents itself.

The District Court ruled "[t]he lack of an option for abortion is what gives rise to TST's causes of action." ER. 9. That is not correct. TST acknowledges the State of Idaho has the authority to regulate a woman's decision to get an abortion. TST objects to the manner in which that authority is being exercised in this case. None of the Constitutional disabilities of the Idaho Abortion Bans would exist if the State of Idaho made one simple change to its laws on abortion – afford all women who are pregnant without their consent a reasonable opportunity to decide whether they want to become mothers. Such a change is completely consistent with *Dobbs*. *Dobbs*, 142 S.Ct. at 2277.

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[9] "Overall, the mean gestational age at time of pregnancy awareness was 5.5 weeks." https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5269518/, last visited July 2, 2024

C. Involuntarily Pregnant Women Do Not Consent to Being Pregnant.

All of TST's claims are premised on the undisputed fact that Involuntarily Pregnant Women do not consent to being pregnant. A woman who consents to being pregnant waives her claims under the Takings Clause, the Involuntary Servitude Clause and the Equal Protection Clause.

The Consequences of Sex Ruling means Involuntarily Pregnant Women consent to being pregnant because pregnancy is an expected and plausible consequence of having sex. Thus, a clear and precise understanding of what constitutes legally effective "consent" to being pregnant is necessary to the resolution of this appeal.

1. The Complaint Alleges Involuntarily Pregnant Women Do Not Consent to Being Pregnant.

The Complaint alleges Involuntarily Pregnant Women do not consent to being pregnant. The District Court must accept this allegation as true and "presume all reasonable inferences in favor" of TST. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). All reasonable inferences in favor of TST means that "consent" is actual consent, both express and implied. *U.S. v. Corona-Chavez*, 328 F.3d

974, 978 (8th Cir. 2003) ("Consent may be express or implied, but in either case, there must be actual consent.").

The District Court "struggled" with this but apparently accepted as true that engaging in Protected Sex is not actual consent to being pregnant. ER 23 ("The Court is also not affirmatively saying that consent to sex is consent to pregnancy."). Nonetheless, the District Court dismissed the idea that a woman could be pregnant without her consent due to the failure of her birth control, calling it "somewhat disingenuous." ER 23.

Whether someone has given their actual consent to being pregnant is a fact question. *Lucero v. Donovan*, 354 F.2d 16, 20 (9th Cir. 1966). Actual consent can be either expressly stated or implied from conduct that indicates a person knowingly and intentionally consented. *U.S. v. Van Poyck*, 77 F.3d 285, 292 (9th Cir. 1996). ("Consent may be express or may be implied in fact from surrounding circumstances indicating Defendant knowingly agreed." [cleaned up]). Since Protected Sex requires the use of birth control and the purpose of birth control is to prevent pregnancy, there is no factual basis for finding a woman knowingly agreed to get pregnant when she had sex using birth control.

At most, she took a risk of getting pregnant, which is not actual consent to becoming pregnant. See discussion *supra* at Section V.C.4.

Actual consent is not constructive consent. *In re Pharmatrak, Inc.,* 329 F.3d 9, 19 (1st Cir. 2003). ("Consent may be explicit or implied, but it must be actual consent rather than constructive consent."). Constructive consent is consent implied by operation of law, not consent inferred from conduct. *U.S. v. Verdin-Garcia*, 516 F.3d 884, 894 (10th Cir. 2008) (Implied consent "means actual consent inferred from circumstances other than an express declaration, and not constructive consent implied by operation of law."). The Courts have relied on constructive consent to adjudicate both Constitutional and non-Constitutional claims. *Jordan v. Weaver*, 472 F.2d 985, 995 (7th Cir. 1973) (State "constructively consented" to waive Eleventh Amendment immunity by participating in federal program and receiving federal funds), rev'd, *Edelman v. Jordan*, 415 U.S. 651 (1974); *Motor Vehicle Accident Indemnification Corp. v. Continental National American Group Co.*, 35 N.Y.2d 260, 264 (1974) (Car rental company constructively consented to car lessee authorizing third parties to drive the car because it "knew or should have known that the probabilities of

the car coming into the hands of another person were exceedingly great.").

2. The District Court's Consequence of Sex Ruling is Constructive Consent to Pregnancy.

Relying on its Consequence of Sex Ruling, the District Court held "women who conceive children through consensual sex do not suffer the very essence of involuntary servitude outlawed by the Thirteenth Amendment." She assumes "the obligations the law imposes on parents for the support and upbringing of a child" by having sex because "[a]s the whole of humanity understands, pregnancy is a potential, natural, understood, and often expected consequence of having sex." ER 23-24.

In the District Court's view, a woman consents to an accidental pregnancy when she engages in Protected Sex. This is constructive consent – consent by operation of law – not actual consent implied from conduct.[10]

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[10] *Dobbs* said nothing that could be construed to mean a woman who engages in Protected Sex thereby consents to becoming pregnant, regardless of whether it is express consent, implied consent or constructive consent.

3. Women Cannot Constructively Consent to Being Pregnant.

It is well established that "[t]he law does not permit constructive consent or fictional waiver to override constitutional rights." *Smayda v. United States*, 352 F.2d 251, 260 (9th Cir. 1966). *See also, Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("*Edelman*") ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.").

Women have a Constitutional right to decide whether she will have children. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972):

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to . . . beget a child.

Women also have a Constitutional right to engage in sex without the intention of becoming pregnant. *See, Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, *even when not intended to produce offspring*, are a form of liberty protected by the Due Process Clause." [emphasis added]).

The right to decide whether to have children and the right to have Protected Sex complement and reinforce one another.[11] The state cannot condition the exercise of one right on the curtailment of the other. *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("*Simmons*") ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."); *Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1929) ("[T]he state may not impose conditions which require the relinquishment of rights guaranteed by the Federal Constitution.").

These fundamental constitutional rights can only be waived by an act of free will, i.e., actual consent. *Edelman,* 415 U.S. at 673 ("Waiver of a constitutional right must be either explicit or by "such overwhelming implications" from the conduct as to "leave no room" for any other reasonable interpretation.); *Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 969 (9th Cir. 2011) ("[A] wavier of [fundamental Constitutional rights] should not be implied and should

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[11] Women have the right to and in fact do use birth control for the purpose of avoiding pregnancy. *Dobbs* explicitly left this fundamental right intact. *Dobbs*, 142 U.S. at 2277.

not be lightly found. Waiver of a constitutional right must be knowing and voluntary." [internal citations and quotations omitted]).

4. The Risk of Pregnancy is Not Consent to Being Pregnant.

There is an inherent risk that a woman who engages in Protected Sex gets pregnant. However, assuming that risk does not waive the Constitutional right to decide whether to have children. As the Court said in *U.S. v. Daniels*, 902 F.2d 1238, 1245 (7th Cir. 1990):

> [K]nowledge and consent are not synonyms. Taking a risk is not the same thing as consenting to the consequences if the risk materializes. A person who walks by himself late at night in a dangerous neighborhood takes a risk of being robbed; he does not consent to being robbed.

See also *U.S. v. Feekes*, 879 F.2d 1562, 1565 (7th Cir. 1989) ("To take a risk is not the same thing as to consent.").

D. The Costs of the Idaho Abortion Bans Should Be Borne by the State.

TST does not seek to relitigate *Dobbs*. *Dobbs* empowers the State of Idaho to conscript a woman's uterus to protect the life of a Prenatal Person without violating the Due Process Clause. But *Dobbs* did not exempt the State of Idaho from the limits placed on exercise of its authority by Constitutional provisions other than the Due Process Clause. Thus, the Takings Clause requires the State to pay rent for the

forced occupancy of a woman's uterus to incubate a Prenatal Person, just like anyone else who would have her become their gestational carrier. *See, First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 315 (1987). (The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." [emphasis in original]); *San Diego Gas Electric Co. v. San Diego*, 450 U.S. 621, 656 (1981) ("When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large.").

E. The District Court Erred By Ruling the Power to Exclude or Remove a Zygote from a Uterus is Not a Property Interest Protected by the Takings Clause.

The term "property," as used in the Takings Clause "denote(s) the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *U.S. v. General Motors Corporation*, 323 U.S. 373, 378 (1945). The Takings Clause does not itself define "property."

This Court held in *S. Cal. Edison Co. v. Orange Cnty. Transp. Auth.*, 96 F.4th 1099, 1104 (9th Cir.) ("*Edison*"):

> Ordinarily, government action that physically appropriates property is treated as a *per se* taking requiring just compensation. But before deciding whether the government has taken a property interest, we first must determine whether any property interest exists. Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law. Our inquiry is not limited to state law, however, or else a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate. [internal citations and quotations omitted].

The Complaint alleges the uterus of an Involuntarily Pregnant Woman is a physical thing. ER 96. The Idaho Abortion Bans appropriate that physical thing for use by a Prenatal Person. ER 96. Advances in medicine have empowered women to routinely exclude or remove a Prenatal Person from the uterus. Advances in medicine have also empowered a woman to rent out the use of her uterus to a third party as a gestational surrogate. The legal question then is whether the power technology confers on Involuntarily Pregnant Woman to exclude or remove a zygote from her uterus is a property interest

protected by the Takings Clause. The answer to that question is "yes" and the Idaho Abortion Bans are therefore a "per se" taking.[12]

Saying "the Anglo-American legal tradition has consistently viewed abortion as a crime – not as a property taking," the District Court ruled "history, tradition, and precedent require dismissal of TST's Takings [Claim]" because "no persuasive authority suggest[s] a woman's uterus is property subject to the same considerations and economic uses other traditionally understood property holds." ER 22. The District Court confined its review of "persuasive authority" to Blackstone's Commentaries, Idaho Code § 18-8802(1) and *Dobbs*. ER 21-22. The District Court erred for three reasons.

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[12] The Idaho Abortion Bans also make it impossible for an Involuntarily Pregnant Woman to rent out her uterus as a gestational carrier. They take property protected by the Takings Clause by depriving a woman of the ability to make any economic use of her uterus. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). (A regulatory taking occurs when the state's regulation completely deprives an owner of *all* economically beneficial use of her tangible property.).

1. The Property Protected by the Takings Clause is the Power to Exclude or Remove any Third Party from the Use or Occupancy of a Uterus.

Any takings claim requires a clear understanding about the precise property right at stake. *Horne v. Dep't of Agric.*, 576 U.S. 350, 380 (2015) (Takings claim needs "precision about whose property rights are at issue and about what property is at issue."). The property interest at stake in this case is the power of a woman to exclude or remove a Prenatal Person from her uterus, a physical thing. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) ("*Cedar Point Nursery*") ("The right to exclude is 'one of the most treasured' rights of property ownership.") citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, (1982) ("*Loretto*").

The District Court's first error was to frame the property interest at stake as "the view that a pregnant woman's uterus is property taken by the State unless she is permitted to reclaim it by abortion." [internal quotations omitted]. ER 21. Having thus tied the use of a uterus to its reclamation by abortion, the District Court proceeded to find a woman has no property interest in her uterus because she cannot lawfully reclaim it by abortion. ER 22.

The District Court's analysis is flawed because it assumes the power to exclude or remove a Prenatal Person from the uterus *exists* as a property interest protected by the Takings Clause *only if* a woman can lawfully *exercise* that power by having the Prenatal Person aborted. ER 21. The District Court failed to consider that a woman's power to exclude or remove a third party from the use of her uterus *exists* regardless of how, when or against whom she chooses to *exercise* it.

The *existence* of a property interest and its *exercise* are two separate and distinct rights for purposes of the Takings Clause. If a property right *exists* in the first instance (e.g. the right of possession), then state interference with the *exercise* of that right is a taking (e.g., compelling occupancy by a third party). *See, Cedar Point Nursery*, 141 S.Ct. at 2072. But if a right does not *exist* as "property" protected by the Takings Clause (e.g. a franchise subject to a relocation obligation), then state interference with the *exercise* of that right is not a taking of property. See *Edison*, 96 F4th at 1104 ("But before deciding whether the government has taken a property interest, we first must determine whether any property interest exists.").

A commonly used metaphor to describe property interests in a tangible thing is the bundle of sticks. The right to exclude any and all third parties from the use and occupancy of one's tangible thing is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto*, 458 U.S. at 433. That "essential stick" does not vanish when the State of Idaho seeks to protect human life by prohibiting the eviction of a Prenatal Person from the premises. That would be the very essence of the State "sidestepping the Takings Clause" by disavowing a property interest in the tangible thing it wants to appropriate. *Edison*, 96 F.4th at 1099.

The fact that an abortion is illegal in Idaho does not mean the power a woman has to exclude a third party from her uterus has been stripped of its legal status as property protected by the Takings Clause. Rather, it means her property, protected by the Takings Clause, has been taken.

2. "Existing Rules and Understandings" Must Include Gestational Surrogacy.

The second reason the District Court erred is because it did not consider the incontrovertible reality that women in the State of Idaho

have routinely engaged in gestational surrogacy for decades.[13] The advent of IVF and gestational surrogacy demonstrate the fact that the use of a woman's uterus to incubate and deliver a Prenatal Person has tangible, economic value in a robust market. Bridget J. Crawford, Taxation, Pregnancy, and Privacy, 16 Wm. & Mary J. Women & L. 327 (2010)[14] ("A surrogate receives money for carrying and bearing a child. This payment is income by any definition, even if the surrogacy contract recites that it is a 'reimbursement.'"). See also *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) ("[B]lood plasma, like a chicken's eggs, a sheep's wool, or like any salable part of the human body, is tangible property which in this case commanded a selling price dependent on its value.").

The "existing rules and understandings" that form the basis for the definition of property are not static. Technological advances, and the economic relationships that arise out of those changes, routinely

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[13] The first gestational surrogacy occurred nearly forty years ago in 1985. https://familyinceptions.com/when-did-surrogacy-start-and-how-it-is-today/, last visited June 21, 2024.

[14] https://scholarship.law.wm.edu/wmjowl/vol16/iss2/4, last visited June 21, 2024.

create new "existing rules and understandings" that did not previously exist. An example of this process is "air rights."

"Air rights" are the use of space over the surface of land without owning an interest in the surface itself. In 1978, the U.S. Supreme Court recognized air rights as property protected by the Fifth Amendment in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 143 n.5 (1978) ("*Penn Central*").

Air rights did not exist in the 19th Century because no one actually used large areas of space over the surface of the land. *United States v. Causby*, 328 U.S. 256, 260-61 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — *Cujusest solum ejus est usque ad coelum*. But that doctrine has no place in the modern world.")

That rapidly changed with the advent of elevators, steel girders and high-rise buildings. By the 1920's, urban developers were using that new technology to divide up real property into separate, defeasible estates for the use and development of the space above the surface by companies that did not own the surface, i.e., "air rights." Herbert Becker, Subdividing the Air - A New Method of Acquiring Air Rights, 6

Chi. Kent Rev. 6 (1927). By 1978, air rights were recognized as "property" for purposes of the Takings Clause in *Penn Central* because the "existing rules and understandings" for air rights as property that could be developed, bought and sold had become an undeniable commercial reality. *Penn Central*, 438 U.S. 143, nt. 6 (Takings Clause "must be applied with reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, *or such as may be reasonably expected in the immediate future*." [emphasis in original, internal quotations and citations omitted]).

New technology creates new uses for and dispositions of tangible things that were once inconceivable. Today's technology gives a woman the ability - i.e., the power - to control how, when and by whom her uterus is occupied. It was reversible error to the District Court to view that power through the myopic "lens" of abortion and conclude it is not "subject to the same considerations and economic uses other traditionally-understood property holds." ER 22.

Human reproduction was dimly understood in the 19th Century. A woman and fetus were considered to be a single person until

"quickening," the first felt movement of the fetus. *Dobbs*, 142 S.Ct. at 2250 ("[A] pre-quickening abortion was not itself considered homicide."). 19th Century women did not have access to reliable birth control.[15] They could not vote, most could not own property in their own name and wives could be legally raped by their husbands. *Latta v. Otter*, 771 F.3d 456, 488 (9th Cir. 2014).

Scientific proof that a zygote is created by the fusion of an egg and sperm cell did not exist until 1876.[16] The idea that a fertilized human egg could be a person in its own right or that a uterus could be used for gestational surrogacy by total strangers was as alien in the 19th Century as air rights. The 19th Century "historical tradition" for human reproduction relied on by the District Court is as obsolete as the whalebone corset and useless as the buggy whip. *See, United States v. Rahimi*, No. 22-915, at *63 (June 21, 2024), Barrett, J. dissenting (The

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[15] Enovid, the first oral contraceptive, was approved by the FDA for birth control in 1960. https://en.wikipedia.org/wiki/Mestranol/noretynodrel#:~:text=Initially%20sold%20in%201957%2C%20Enovid%20was%20first%20marketed,over%20other%20methods%20such%20as%20condoms%20and%20diaphragms, last visited July 2, 2024.

[16] https://en.wikipedia.org/wiki/Oscar_Hertwig, last visited June 21, 2024.

Courts should not "force 21st-century regulations to follow late-18th-century policy choices, giving us a law trapped in amber." [internal quotations omitted]).

TST is not asking the Court to spin a property interest in the use of a woman's uterus out of whole cloth. Rather, TST asks the Court to recognize we are living in the 21st Century and confer the imprimatur of "property" protected by the Takings Clause on the very real power and economic control women have over the uterus, as demonstrated by nearly forty years of gestational surrogacy. It was reversible error for the District Court to ignore that scientific and commercial reality.

3. Common Law and Natural Law Recognize Human Beings Have a Property Interest in Their Own Bodies.

The District Court's third error was to confine its review of the common law to selected excerpts from Blackstone's commentaries. ER 21. Blackstone wrote at a time when the fetus was regarded literally as part of the mother's body with no independent existence of its own, at least up until quickening. The excerpts relied on by the District Court must be read in that context.

Under common law, individuals have a property interest in the use of their own bodies. In *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 to 252 (1891), the U.S. Supreme Court said:

> 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, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . .To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass.

The common law in Idaho is based on the principles of natural law. *Marty v. State*, 117 Idaho 133, 143 (1990). As explained by John Locke in Two Treatises of Government, Bk. II, § 87 (Gryphon special ed. 1994) (1698) and the Montana Supreme Court in *Armstrong v. State*, 296 Mont. 361, 371-72 (1999), natural law means:

> [T]he laws of nature require that each individual has an inherent property interest in his own person and has the capacity for and the right of rational self determination which must be promoted and protected by civil society and political institutions.

An Idaho woman can dispose of her uterus by hysterectomy or anatomical gift. Idaho Code § 39-3404. "The right of a property owner to dispose of his or her property on terms that he or she chooses has come

to be recognized as a separate stick in the bundle of rights called property." *Nelsen v. Nelsen*, 508 P.3d 301, 332 (Idaho 2022).

An Idaho woman can lease out the use of her uterus to a third party as a gestational surrogate. "The right to transfer is one of the most essential sticks in the bundle of rights that are commonly characterized as property." [internal quotations and citations omitted]. *Shackleford v. U.S.*, 262 F.3d 1028, 1032 (9th Cir. 2001).

A woman's uterus is part of her body and a tangible thing. The manner in which she uses, leases and disposes of her body is recognized by common and natural law as "property" for purposes of the Takings Clause.

F. The District Court Erred by Dismissing the Involuntary Servitude Claim.

1. Engaging in Protected Sex is Not Consent to Being Pregnant.

An Involuntarily Pregnant Woman does not consent to carry a Prenatal Person in her body.[17] The Idaho Abortion Bans force her to provide the services and labor necessary to incubate a Prenatal Person

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[17] As with all of a woman's other constitutional rights, she cannot waive her rights under the Thirteenth Amendment by constructive consent. See discussion, *infra*, at Section V.C.3.

to term under the threat of incarceration. The U.S. Supreme Court ruled in *United States v. Kozminski*, 487 U.S. 931, 952 (1988) that "'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." The Thirteenth Amendment does not apply to "enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc." *Butler v. Perry*, 240 U.S. 328, 333 (1916). Pregnancy is not and has never been on that short list.

It is not involuntary servitude if the person being forced to work has a choice to avoid it, even if the choice is a painful one. *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990), citing *United States v. Shackney,* 333 F.2d 475, 487 (2nd Cir. 1964).

The Idaho Abortion Bans force a woman to carry a Prenatal Person to term because she will go to jail if she aborts it. ER 99. Jail is not a choice; it is the very essence of a threat of coercion through law

One significant implication of the Consequence of Sex Ruling is that a woman can have consensual sex but not consent to pregnancy

only if she has been sterilized by hysterectomy. This is an illusory choice because it is unconstitutional.

A woman has the Constitutional right to decide whether to have children *and* the Constitutional right to engage in Protected Sex, using the full array of available birth control methods. She cannot be coerced into limiting the exercise of one right as the price of exercising the other. *Simmons*, 390 U.S. at 394. Her decision whether to have children cannot be conditioned upon getting sterilized or abstaining from sex altogether.

2. Involuntarily Pregnant Women Do Not Have the Opportunity to Opt Out of the Idaho Abortion Bans.

The District Court dismissed the Involuntary Servitude Claim because "to take this logic to its end, it could find that any obligations the law imposes on parents for the support and upbringing of a child would constitute involuntary servitude and justify the termination of the child. Such a result is blatantly absurd." ER 24. The District Court's analysis is flawed because Idaho, like every other state in the Union, offers women the choice to opt out of being a parent immediately after the child is born.

In Idaho, that choice is provided by the Safe Haven Act, Idaho Code § 39-8201 et seq. The Safe Haven Act allows the mother of a new-born Prenatal Person to abandon that child during its first thirty days of life without criminal liability. She has a choice (undoubtedly painful) to avoid the legal responsibilities of motherhood.

No choice is available under the Idaho Abortion Bans to sever the bonds of parenthood before a Prenatal Person is born. The Idaho Abortion Bans violate the Thirteenth Amendment because an Involuntarily Pregnant Woman has no opportunity to opt out of providing her services and labor to a Prenatal Person.[18]

The District Court's Consequence of Sex Ruling misses the mark. The Idaho Abortion Bans do not put Involuntarily Pregnant Women into involuntary servitude because they consented to pregnancy, either actually or constructively. They are put into involuntary servitude

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[18] A man and woman each contributes one of the gametes necessary to create a Prenatal Person. However, neither the Idaho Abortion Bans nor any other state law obligates a man to provide any labor or services for the incubation of a Prenatal Person to term. *Doe v. Roe*, 142 Idaho 202, 205 (2005) ("Mere biology does not create a father with legal rights and responsibilities to a minor child.").

because they do not have the option to opt out of pregnancy and avoid the work that entails.

An Involuntarily Pregnant Woman could opt out of pregnancy by travelling to another state that offers legal abortions, such as Washington. However, she remains subject to the involuntary servitude imposed by the Idaho Abortion Bans until that out-of-state abortion is completed. Involuntary servitude for an hour is still involuntary servitude.

G. The District Court Erred by Dismissing the Equal Protection Claim.

1. The Idaho Abortion Bans Infringe Upon Protected Sex, a Fundamental Liberty Interest.

The Complaint alleges the exemption granted to rape victims from the Idaho Abortion Bans is "discrimination [that] infringes upon the fundamental right of Involuntarily Pregnant Women to engage in Protected Sex because they are forced to pay the physical, emotional, and financial costs of being pregnant without their consent while women who report they are impregnated by rape are not." ER 100. The District Court said, "Defendants are not infringing on [a fundamental right] because the regulations at issue do not focus on sex: the

regulations focus on abortion." ER 26. This was an error because infringement is determined by the *effect* of statute on a right, not the statute's purpose or "focus." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980) ("The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.").

2. The Idaho Abortion Bans Are Not Narrowly Tailored to Achieve Their Purpose.

Citing *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("*Romer*"), the District Court ruled the Idaho Abortion Bans are "narrowly tailored to [Idaho's] compelling interests in preventing abortions and protecting the victims of criminal conduct. That those two interests overlap (and 'leave out' TST members) is not a violation of equal protection, but the reality of living in a pluralistic society." ER 26. The District Court's reliance on *Romer* is misplaced. *Romer* said nothing about an "overlap" theory, nor did it address what constitutes "narrowly tailored."

The Idaho Abortion Bans are not narrowly tailored to achieve the twin goals of protecting Prenatal Persons and rape victims because a less restrictive alternative is readily available. The State of Idaho could achieve both of these objectives by banning abortion without regard to

whether the sex was consensual, provide compensation to all women who carry an unwanted Prenatal Person to term, provide all women who are pregnant without their actual consent with a meaningful opportunity to opt out of the ban and subject rapists who impregnate their victims to a life sentence. This alternative would protect Prenatal Persons, deter rapists and treat rape victims and Involuntarily Pregnant Women the same. The availability of this alternative means the Idaho Abortion Bans are not narrowly tailored to achieve their stated goals. *Walker v. Beard*, 789 F.3d 1125, 1137 (9th Cir. 2015) (The "government's burden is two-fold: it must support its choice of regulation, and it must refute the alternative schemes offered by the challenger, but it must do both through the evidence presented in the record" citing *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011); *Project 80'S, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) ("[R]estrictions which disregard far less restrictive and more precise means are not narrowly tailored.").

H. TST Has Standing Because it Commits a Crime if it Provides a Medical Abortion to an Idaho Member.

The U.S. Supreme Court held over fifty years ago that a medical professional subject to criminal penalties for providing an abortion has

a "sufficiently direct threat of personal detriment" to show "injury in fact" and does not have "to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("*Doe*"). *Doe* was reaffirmed in *June Med. Servs. LLC v. Russo* , ___U.S. ___, 140 S. Ct. 2103, 2118–19 (2020) (plurality opinion), overruled on other grounds by *Dobbs v Jackson Women's Health Org*, 597 U.S. ___, 142 S.Ct. 2228 (2022).

In *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004) ("*Wasden*"), this Court held a physician has standing to challenge a restriction on abortions for minors because he is exposed to criminal liability if he does not comply with the restriction. Citing *Doe*, this Court said:

> [Plaintiff] has stated his clear intention to continue to perform abortions for his patients, of whom some are minors. He has alleged a sufficiently concrete and imminent injury — possible prosecution and imprisonment — to challenge the provisions that ban abortion providers from performing abortions on minors except in accord with the statutory requirements. Whether he continues to perform abortions subject to the statute, desists from performing them to avoid the statute's penalties, or violates the statute so as to practice his profession in accord with his medical judgment, his liberty will be concretely affected.
>
> 376 F.3d at 915-16

Like the physician in *Wasden*, TST has stated its clear intent to provide medical abortions in Idaho but has not done so due to fear of prosecution for violating the Idaho Abortion Bans. ER 69. Like the physician in *Wasden*, TST has standing to challenge a law that criminalizes its conduct.

In *McCormack,* this Court held a physician had standing to challenge abortion restrictions because he

> stated his clear intention to prescribe FDA approved medications to women in Bannock County, Idaho . . . who seek to medically terminate their pregnancies in violation of the restrictions contained in Idaho Code Title 18, Chapters 5 and 6 prior to fetal viability. . . . [H]is ability to legally prescribe FDA-approved abortion medication in Bannock County is sufficient to demonstrate an 'actual and imminent' injury—the risk of criminal prosecution for prescribing abortion pills prior to viability.
>
> 788 F.3d at 1028

Like the physician in *McCormack*, the Clinic has the ability to prescribe FDA approved abortion medication to Idaho residents. The FDA requires the prescription be made by a "certified prescriber."[19] The "certified prescriber" is not required by REMS to be licensed in the state

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[19]https://www.accessdata.fda.gov/scripts/cder/rems/index.cfm?event=RemsDetails.page&REMS=390, last visited June 7, 2024.

of the patient for whom the prescription is written. Like the physician in *McCormack*, TST has stated its intent to provide abortions to Idaho residents using FDA approved medications and thus shown actual and imminent injury. ER 69.

The District Court erred because it refused to follow *Doe*, *Wasden* and *McCormick*. The District Court compounded its error by imposing four (4) additional conditions on TST to get standing:

- TST's providers must become licensed in Idaho.
- A TST member in Idaho must become "involuntarily pregnant" due to failed birth control.
- That member chooses to abort her child.
- That member selects the Clinic to help perform the abortion, rather than some other abortion provider.

ER 16.

The Clinic's medical staff does not need to be licensed in Idaho for TST to have standing. *Brokamp v. James*, 66 F.4th 374, 388 (2nd Cir. 2023) (Virginia licensed mental health counselor has standing to challenge New York regulations that "presently" bar her from servicing New York clients online.). The Idaho Abortion Bans penalize *everyone* who provides an illegal abortion, regardless of whether they are medical

professionals licensed in Idaho. An APRN or a physician who is not licensed in Idaho faces heavy fines and two to five years in prison. Idaho Code § 18-605(1). Medical personnel *licensed in Idaho* face the same penalties if they knowingly provide an illegal abortion. Idaho Code § 18-605(3). Thus, TST is at risk for criminal prosecution if the Clinic delivers medical abortions to Idaho members of TST, regardless of whether the Clinic's staff is licensed in Idaho and regardless of whether they are APRN's or physicians.

TST has not incurred the expense of hiring Idaho licensed personnel because it would be pointless and futile to do so. ER 69. The Clinic's stated intention to provide abortions in Idaho using its current staff is sufficient to give TST standing to challenge the Idaho Abortion Bans.[20] *Taniguchi v. Schultz,* 303 F.3d 950, 957 (9th Cir.2002) ("We have consistently held that standing does not require exercises in futility.").

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[20] Providing medical abortions in Idaho with Idaho licensed personnel is not a "someday" proposition. TST could readily use the services of Dr. J.D., who is licensed in Idaho, today. Input Dr. J.D.'s full name (see ECF No. 33) into https://apps-dopl.idaho.gov/IBOMPortal/AgencyAdditional.aspx?Agency=425&AgencyLinkID=30, last visited June 15, 2024.

Moreover, TST has no obligation to comply with the very laws it challenges to get standing. *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1142-43 (D. Idaho 2013), aff'd sub nom, *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015) ("Given that [the physician] faces the threat of prosecution for performing medical abortions, it makes little sense to suggest that [he] must first comply with those laws before he has standing to challenge them."). TST therefore does not need to have any of its staff licensed in Idaho to challenge the Idaho Abortion Bans that apply to *anyone* who provides abortions.

There is no authority to support the District Court's requirement that TST must identify a specific TST member who is an Involuntarily Pregnant Woman and will use the Clinic to get standing.[21] The Courts have consistently recognized the standing of a physician to assert the rights of *prospective* patients without specifically identifying them or proving how imminent their treatment will be. *June Med. Servs., L.L.C.*

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[21] The District Court appears to confuse the standing requirements for TST's standing as an abortion provider with TST's standing as an association representing Involuntarily Pregnant Women. See discussion *supra* in Section V.J.

v. Gee, 814 F.3d 319, 322 (5th Cir. 2016) ("[T]he physician plaintiffs have standing to assert the rights of their prospective patients.").

In *Wasden*, this Court posited a hypothetical patient who *might* be discouraged from using the physician's services due to restrictions on a minor getting an abortion. This Court said the mere possibility of a hypothetical potential patient being discouraged from using a physician's services due to an abortion restriction "is a threatened injury in fact [that] is neither speculative nor inchoate." 376 F.3d at 917.

Even assuming, *arguendo*, TST needs to prove there are one or more Involuntarily Pregnant Woman in Idaho in need of its services to establish standing, i.e., prospective patients, TST has made that showing.[22] The Dr. J.D. Opinion shows there are dozens of TST members in Idaho who are Involuntarily Pregnant Women during the

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[22] The District Court also required TST to prove that a specific Involuntarily Pregnant Woman "selects the Clinic to help perform the abortion, rather than some other abortion provider." ER 16. Simply selecting TST for an illegal abortion would put a woman at risk for criminal prosecution. Idaho Code § 18-606(2)("Every woman who knowingly . . . solicits . . . for herself the production of an abortion . . shall be deemed guilty of a felony.").

course of a year, i.e., prospective patients. Those Involuntarily Pregnant Women hold the religious belief that they must abort their unwanted pregnancies. Given the low cost and convenience of the Clinic and its established use by TST members, it is highly likely Involuntarily Pregnant Women will use the Clinic. ER 69.

I. TST Has Standing as a Religious Organization Because TST Has Suffered Both a Non-Monetary Frustration of its Mission and a Diversion of Resources.

As the District Court acknowledged, an organization has standing in its own right if "it suffered both a diversion of its resources and a frustration of its mission." ER 15. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 844 (9th Cir. 2020) ("An organization may establish standing on its own behalf by showing that the defendant's conduct resulted in a diversion of its resources and frustration of its mission."). Injuries that affect the organization's "core mission" establish standing. *Id.*

The core mission of TST is to promote the Satanic Tenets and The Satanic Abortion Ritual. ER 66. The Idaho Abortion Bans make the exercise of the Satanic Abortion Ritual impossible in Idaho. ER 90. The Idaho Abortion Bans clearly frustrate TST's core mission.

After *Dobbs*, TST starting spending money to create the Clinic because abortion providers throughout the country were closing their doors, including providers in Idaho. $100,000 was diverted from TST's education and advocacy and into providing medical abortions nationwide (including Idaho) so TST members could continue to practice The Satanic Abortion Ritual. The Clinic started out serving only New Mexico residents but is and always has been a platform for the eventual distribution of abortifacients nationwide, including Idaho.

Citing *Lake Forest*, the District Court ruled the $100,000 spent by TST to open the Clinic was "fixing a problem that would not otherwise affect the organization at all." The District Court held the relief sought by TST would not redress that injury because "whatever happens in Idaho will not make or break the Clinic." ER 16.

The District Court erred because it ignored the non-monetary injury caused by the Idaho Abortion Bans to TST's core mission – the promotion of The Satanic Abortion Ritual. ER 16. *That* injury, coupled with the $100,000 spent on the Clinic, support standing because they are both injuries resulting from the Idaho Abortion Bans' frustration of TST's core mission. ER 16, 68-69. *See also*, *Sabra v. Maricopa Cnty.*

Cmty. Coll. Dist., 44 F.4th 867, 880 (9th Cir. 2022) (Organization established standing because the diversion of resources to counteract defendant's actions frustrated its central mission).

In *Nielsen v. Thornell*, No. 22-15302, at *8-9 (9th Cir. May 21, 2024), this Court explained the interplay between non-monetary injury to an organization's mission and the money spent to ameliorate that injury:

> When we assess organizational standing, we must vigilantly examine the breadth of the group's mission to ensure that the organization maintains a genuine and demonstrable commitment to that mission-independent of the lawsuit that it seeks to bring. Courts must remain wary of sprawling or multipronged mission statements that would allow an organization to have near limitless standing to sue. Otherwise, we run the risk of allowing organizations to bootstrap almost any politically fraught case onto their expansive mission statement and race to the courthouse, whether or not their lawsuit bears any significant connection to their actual activities. That is precisely the outcome that Article III seeks to avoid.
>
> We have thus found standing if a substantial and clear connection exists between the lawsuit and the organization's guiding objectives. But an organization cannot manufacture standing merely by defining its mission with hydra-like or extremely broad aspirational goals such as "vindicating constitutional rights" or "ensuring equality." Otherwise, Article III standing would be severely eroded as it would sweep in almost any case and allow a party to "manufacture an injury" in virtually any case "by choosing to spend money

> fixing a problem" that genuinely "would not affect the organization." [internal citations omitted]

If the requested relief is granted, TST will be able to resume its core mission of promoting the TST Tenants in Idaho by educating TST members who get abortions about The Satanic Abortion Ritual. It will support that educational effort by also providing low cost, readily accessible abortions using the Telemedicine Model. Thus, the redress prong of standing is satisfied.

J. TST Has Standing as an Association to Represent its Members Who Are or Will Become Involuntarily Pregnant Women.

1. TST Members Do Not Have to Be Identified by Name.

In *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) ("*La Raza*"), this Court held:

> Where it is relatively clear, rather than merely speculative, that one *or more members* [of an association] have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured. [emphasis added]

The Idaho Defendants do not claim they need to know the identity of TST members to respond to the Complaint. *See*, Memorandum in Support of Motion to Dismiss filed March 14, 2023, ECF No. 23-1 at p.

4. Therefore, TST does not need to identify any of its members by name to establish standing to represent their interests. *See*, *Does I through XXIII* v. *Advanced Textile Corp.*, 214 F.3d 1058, 1070 (9th Cir. 2000) (Article III standing does not require the identification of an individual plaintiff by name).[23]

2. TST Proved There Are Dozens of Involuntarily Pregnant Women Injured by the Idaho Abortion Bans.

The District Court erroneously held TST failed to prove "*anyone* who is a member of TST has suffered or will suffer an injury" due to the Idaho Abortion Bans. [emphasis in original] ER 12. TST submitted uncontradicted expert testimony that, to a reasonable degree of medical probability, there are twenty-seven (27) Involuntarily Pregnant Women in Idaho each year. The District Court erred by summarily rejecting the Dr. J.D. Opinion without a *Daubert* hearing.[24]

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[23] TST members wish to remain anonymous due to the risk of violent retribution from domestic terrorists motivated by animosity to proponents of abortion and non-Christian religious beliefs. ER 88.

[24] This Court reviews *de novo* "whether the district court properly followed the framework set forth in *Daubert*." *Walker v. Soo Line Railroad*, 208 F.3d 581, 590 (7th Cir. 2000), citing *United States v. Hall*, 165 F.3d 1095, 1101 (7th Cir.), *cert. denied*, 119 S.Ct. 2381 (1999).

An individual woman who is not pregnant does not have standing to challenge an abortion restriction due to the uncertainties of becoming pregnant in the future. *Roe v. Wade*, 410 U.S. 113, 128 (1973) ("*Roe*") (She has no standing because "possible future contraceptive failure . . . may not take place."). However, once she becomes pregnant, she retains her standing to challenge an abortion restriction after having an abortion or giving birth because pregnancy is a condition that is "capable of repetition yet evading review." *Id.* at 125. In addition, women who will become pregnant after the filing of the Complaint also have standing to challenge an abortion ban because their injury is imminent. *Pinkert v. Schwab Charitable Fund*, 48 F.4th 1051, 1055 (9th Cir. 2022) ("An injury that has not yet materialized but will occur in the future can be a basis for Article III standing, but the injury must be imminent, meaning that it must be certainly impending." [internal quotations and citations omitted]).

Thus, as the U.S. Supreme Court held in *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) ("*Singleton*") "a class could be assembled [to challenge an abortion restriction] whose fluid membership always included some women with live claims." This group includes both

women who are pregnant at the time the Complaint is filed *and* women who will become pregnant during the course of a year.

It is a biological certainty that a large enough group of women of child-bearing age will, over the course of a year, produce pregnant women. It is a biological certainty that some subset of that group will become pregnant unintentionally due to the failure of their birth control. And it is an indisputable fact that a smaller subset of that group will get an abortion. If the original group of women of child-bearing age is large enough, then the subset of women who are unintentionally pregnant due to the failure of their birth control and seek an abortion will also be large enough to eliminate the uncertainties inherent in any one individual woman becoming involuntarily pregnant.

The question then becomes how large a group of women is necessary to establish a class whose members always include at least one (1) live claim by an Involuntarily Pregnant Woman, as contemplated by *Singleton*? In Dr. J.D.'s Opinion, 1,750 TST female members of child-bearing age in Idaho is a large enough group to show there are twenty-seven (27) Involuntarily Pregnant Women during the

course of a year. This is a group that, in the words of *La Raza,* "is relatively clear, rather than merely speculative."[25] 800 F.3d at 1041.

The District Court acknowledged it is not "unreasonable to suggest someone in Idaho meets the criteria" for being an Involuntarily Pregnant Women.[26] ER 14. However, the District Court erred by relying on *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) ("*Summers*") to hold it needed "more than speculation based upon statistics." ER 14.

The District Court's reliance on *Summers* was misplaced because *Summers* is readily distinguishable from this case. The regulations at issue in *Summers* affected selected tracts of 250 acres or less in national forests that had been affected by forest fires and were exempt from certain environmental regulations (the "Exemption"). *Id.* at 490-91.

The dissent in *Summers* said there was a "statistical probability" the "recreational interests' of the "thousands" of Sierra Club's members who visited Sequoia National Forest each year would be injured by the

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[25] Women in this group will seek an abortion for an unwanted pregnancy because they believe in the TST Tenets.

[26] This concession, standing alone, meets the "relatively clear" standard required by *La Raza*. *Id.*

Exemption. *Id.* at 497. However, the Sierra Club provided no data or analysis to show the likelihood any one of its members would actually visit a tract of land in the Sequoia National Forest subject to the Exemption. *Id.* at 499. The Court was not provided with any evidence that would winnow down the Sierra Club's total California membership (which numbered in the thousands) to a subset that visited the specific sites affected by the Exemption in Sequoia National Park.

The U.S. Supreme Court said it was "conjecture" that any one member of the Sierra Club would "stumble" onto a site of 250 acres or less subject to the Exemption. *Id.* at 496. The U.S. Supreme Court went on to say "[t]his novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm" *Id.* at 498.

It is not conjecture that twenty-seven (27) TST members in Idaho will suffer harm due to the Idaho Abortion Bans each year. That fact is established by the opinion of a qualified expert witness who started with 1,750 women of child-bearing age and winnowed that number down to a twenty-seven (27) Involuntarily Pregnant Women by the

application of published government statistics on fertility, abortion, and accidental pregnancy. ER 81.

3. The District Court Erred by Dismissing Dr. J.D.'s Opinion Without a *Daubert* Hearing.

The District Court rejected the Dr. J.D. Opinion because "[i]t is . . . based upon statistics and probabilities that *may or may not* be accurate." [emphasis in original]. ER 14. The District Court erred because it failed to conduct the analysis required by *Daubert* to conclude the Dr. J.D. Opinion was "speculation" that did not reflect "a real-life setting."[27] ER 14. *See, U.S. v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000) (Conviction reversed because "the district court should have applied the analytical principles set forth in *Daubert*, but it did not.").

The District Court only had to look at the websites cited by Dr. J.D. to verify the validity of her sources for rates on pregnancy, unintended pregnancy and the failure of birth control. ER 80-81. Courts routinely rely on statistics generated by public health agencies and

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[27] The District Court relied on *Satanic Temple, Inc. v. Rokita*, 2023 WL 7016211 (S.D. Ind. Oct. 25, 2023), which is being appealed to the Seventh Circuit (Case No. 23-3247) on the grounds, *inter alia*, the District Court failed to conduct a *Daubert* hearing.

organizations to establish facts related to pregnancy and abortion when expressed as a percentage of the population. See, e.g., *Whole Woman's Health v. Paxton*, 978 F.3d 896, 923 (5th Cir. 2020) (Abortion rates in first trimester from Centers for Disease Control and Prevention data); *Korte v. Sebelius*, 735 F.3d 654, 726 (7th Cir. 2013), cert. den. __U.S.__ 134 S.Ct. 2903 (2014) ("[N]early one-half (49 percent) of all pregnancies in the United States are unintended, and roughly 40 percent of those pregnancies (22 percent of all pregnancies) end in abortion" citing Guttmacher Institute, In Brief: Facts on Induced Abortion. in the United States); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 949 (D. Neb. 1986) (Fertility rates for black females reported by the State of Nebraska), *aff'd*. 834 F.2d 697 (8th Cir. 1987).

TST was entitled to a *Daubert* hearing to determine whether the Dr. J.D. Opinion "may or may not be accurate" and comport with "real life." *U.S. v. Jones*, 24 F.3d 1177, 1179 (9th Cir. 1994) ("The judge must therefore assess [at a *Daubert* hearing] whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." [cleaned up]).

Dr. J.D. should have the opportunity to explain why the statistics generated by the State of Idaho, the Centers for Disease Control and Prevention and the National Institute of Health are reliable and routinely relied on by experts. *Hudspeth v. C.I.R*, 914 F.2d 1207, 1215 (9th Cir. 1990) ("[E]xperts may properly rely on information that is of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.").

Dr. J.D. should have the opportunity to explain the steps taken in applying those statistics to winnow down a group of 1,750 women of child-bearing age to a class of twenty-seven (27) Involuntarily Pregnant Women. *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1047 (9th Cir. 2014) (One purpose of Daubert hearing is to examine whether "someone else using the same data and methods [is] able to replicate the results." [cleaned up]).

The District Court abused its discretion by rejecting TST's expert without adhering to *Daubert* procedures. *Id.*, at 1053 ("Expert testimony may be excluded by a trial court under Rule 702 of the Federal Rules of Evidence only when it is either irrelevant or unreliable."). *See also, Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir.

2004) ("[T]he judge could not exclude [the expert] on the basis of her affidavit and curriculum vitae without voir diring her, which could have been done over the phone . . . [The expert's] affidavit was critical evidence and nothing in it or in her curriculum vitae showed that she was unqualified to give expert evidence in this case.").

VI. CONCLUSION

This case raises many of the issues *Dobbs* left undecided. For the reasons set forth above, TST respectfully requests the dismissal of the Complaint be reversed and the case remanded so those issues can be fully litigated.

July 8, 2024

W. James Mac Naughton
W. James Mac Naughton, Esq.
7 Fredon Marksboro Road
Newton, NJ 07860
wjm@wjmesq.com
732-213-8180
Attorney for Plaintiff-Appellant
The Satanic Temple

Jeremiah M. Hudson
Jeremiah M. Hudson
Fisher Hudson Shallat
950 W. Bannock St.
Suite 630,
Boise, ID 83702
jeremiah@fisherhudson.com

208-345-7000
Attorney for Plaintiff-Appellant
The Satanic Temple

VII. Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

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July 8, 2024

W. James Mac Naughton
W. James Mac Naughton, Esq.

VIII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date of this pleading, I electronically filed it with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

BRIAN V. CHURCH
Deputy Attorney General
brian.church@ag.idaho.gov

/s/ W. James Mac Naughton