UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant. and MIKE MOYLE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his capacity as President Pro Tempore of the Idaho State Senate; and the SIXTY-SEVENTH IDAHO LEGISLATURE, Intervenor-Defendants.	Case No. 1:22-cv-00329-BLW

IDAHO LEGISLATURE'S SUPPLEMENTAL BRIEF RE MOTION TO RECONSIDER THE PRELIMINARY INJUNCTION

Monte Neil Stewart, ISB No. 8129
11000 Cherwell Court
Las Vegas, Nevada 89144
Telephone: (208)514-6360
monteneilstewart@gmail.com

Daniel W. Bower, ISB No. 7204
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, Idaho 83686
Telephone: (208) 345-3333
dbower@morrisbowerhaws.com

Attorneys for Intervenor-Defendants

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Other Authorities:

This is the Supplemental Brief of the Speaker of the Idaho House of Representatives Mike Moyle, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Seventh Idaho Legislature (collectively "Legislature") regarding reconsideration of the August 24, 2022 preliminary injunction, Dkt. 95. It is filed pursuant to this Court's January 24, 2023 Docket Entry Order, Dkt. 122.

Introduction

The preliminary injunction issued last August rests on the conclusion that Idaho Code § 18-622 and the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd ("EMTALA") directly conflict.*See* Mem. Decision and Order, Dkt. 95, at 24 (holding that "given the extraordinarily broad scope of Idaho Code § 18-622" it is not "possible for healthcare workers to simultaneously comply with their obligations under EMTALA and Idaho statutory law"). Without that conflict, federal law does not preempt Section 622 and the only reason for the injunction fails. As we explain below, the Idaho Supreme Court's recent decision sustaining the constitutionality of Idaho's abortion laws removes the conflict asserted by the United States ("Government") and relied on by this Court. Section 622 does not prohibit doctors from terminating an ectopic or other non-viable pregnancy, and EMTALA does not preempt the State of Idaho from protecting the lives of unborn children. EMTALA *requires* it.

I. The Idaho Supreme Court's recent decision conclusively refutes the Government's interpretation of Idaho law.

Consider first the Government's misconstruction of Section 622. The Idaho Supreme Court's final[1] decision holds that "ectopic and non-viable pregnancies do not fall within [Section 622's] definition of 'abortion.'" *Planned Parenthood Great Nw. v. State*, No. 49615, 2023 WL

[1] Per January 27, 2023 Idaho Supreme Court email to all counsel: "the Supreme Court Opinion in the above proceeding released January 5, 2023, is now final."

110626 at *7 (Idaho Jan. 5, 2023) (*Planned Parenthood*). That interpretation of Idaho law is binding on federal courts.[2] Consequently, this Court's ruling that "termination of an ectopic pregnancy falls within the definition of an 'abortion'" is now legal error. Mem. Decision and Order, Dkt. 95, at 23.

It follows that the purported conflict between EMTALA and Idaho law—as set up by the Government[3] and accepted by this Court[4]—vanishes. Section 622 does not have "the extraordinarily broad scope" previously attributed to it. Mem. Decision and Order, Dkt. 95, at 24. Idaho law firmly supports emergency medical care for women suffering from ectopic and other non-viable pregnancies. The preliminary injunction ought to be dissolved for that reason alone. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008) (requiring a moving party to establish that it will likely succeed on the merits).

II. Because the Government's case is materially premised on its gross misconstruction of Section 622, the Government can no longer show that it will likely succeed on the merits.

Because of *Planned Parenthood's* holding on the real scope of Section 622, the question is no longer whether the Government's case and the preliminary injunction are premised on a false foundation. It is certain they are. The only issue left is whether anything valid remaining in the record made by the Government supports its likelihood of success on the merits. *See Winter,* 555 U.S. at 21. The answer is no. Nevertheless, because it has no alternative at this point, the

[2] *See, e.g., Paulson v. City of San Diego,* 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc) ("When interpreting state law, we are bound to follow the decisions of the state's highest court." (citations omitted)).

[3] *See* Section II below and Legislature's Joinder, Dkt 121, at 2-3 (collecting numerous instances of the Government and its experts relying on their false understanding that Section 622 criminalizes ectopic and other non-viable pregnancies).

[4] *See* Mem. Decision and Order, Dkt. 95, at 23–24.

Government will argue that its record shows an actual, preemption-supporting conflict even under the correct construction of Section 622. That contention is futile.

Very recently, the Legislature filed a collection of numerous instances where each of the following endorsed and relied on the gross misconstruction of Section 622: the Government, the Government's doctor-declarants, and this Court.[5] For ease of reference, that collection is attached as Exhibit 1.

Of particular importance is the extent to which the Government's expert witnesses built their opinions of "conflict" on their incorrect view that Section 622 reaches much farther than it does. The Legislature's collection of references to them doing just that merits close attention, with paragraph 14 of the Government's primary doctor-declarant, Dr. Fleisher, being particularly instructive.[6] Similarly important is that the Government's doctor-declarants rejected the Legislature's doctor-declarants' contrary opinions exactly because those opinions were based on the *correct* understanding of Section 622's scope.[7] Again, Dr. Fleisher's language leads the way.[8]

This short brief does not permit a thorough, side-by-side comparison of the competing opinions. But a close comparison leads inexorably to these conclusions: One, the Government's doctor-declarants' opinions of "conflict" rest materially on their gross misunderstanding of Section

---

[5] *See* Legislature's Joinder, Dkt. 121; see, in particular, pages 2–3.

[6] *See* Decl. Lee A. Fleisher, M.D., Dkt. 17-3, at ¶ 14. Dr. Fleisher is figuratively and literally the Government's "Exhibit A." *Id.; see also* Supp. Decl. Fleisher, M.D., Dkt. 86-2.

The Legislature believes that the Government's doctor-declarants' reliance on the gross misconstruction would have been even more fully exposed had this Court accepted the Legislature's request for an evidentiary hearing where those declarants would have faced cross-examination. *Compare* Legislature's August 15, 2022 Ltr. Brf., Dkt. 44, *with* Mem. Dec. and Order, Dkt. 73.

[7] *See* Legislature's Joinder, Dkt. 121, at 2–3.

[8] *See* Supp. Decl. Fleisher, Dkt. 86-2, at at ¶ 3.

622. Two, that being the case, the Legislature's doctor-declarants' opinions of "no conflict" now constitute the *only* credible expert testimony on that issue in the record before this Court.

The Government's *legal* case's material reliance on its grossly overbroad construction of Section 622 is even easier to see because it is two-fold: that case repeatedly weaves that misunderstanding through its legal arguments[9] and repeatedly relies on the now-discredited opinions of the Government's doctor-declarants.[10]

Because the Government's case is materially premised on its gross misunderstanding of the scope of Section 622, that fact alone defeats any notion that the Government has shown any likelihood of success on the merits. In other words, that reality alone renders the preliminary injunction insupportable. *See Winter*, 555 U.S. at 21. But the Government's case and hence the injunction are also materially premised on another error—the Government's misquotation-by-excision of the EMTALA provision governing abortion. The next Section so shows.

III. The preliminary injunction is also materially premised on an error regarding EMTALA.

Because the preliminary injunction relies on a purported conflict between state and federal law, both the scope of state law (Section 622) and the scope of federal law (EMTALA) are relevant to the motion for reconsideration. *See* Mem. Decision and Order, Dkt. 95, at 19–20. The stark fact is that the Government's case is *also* materially premised on its "misquote" of the important EMTALA provision governing abortion.

EMTALA prohibits "placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her *unborn child*) in serious jeopardy," 42 U.S.C. §

[9] *See* Legislature's Joinder, Dkt. 121, at 2–3.

[10] *See, e.g.,* Govt Memo ISO Prel. Inj., Dkt 17-1, at 2, 7, 8, 9, 10, 15, 16, 18, 19; Govt Reply Prel. Inj., Dkt. 86, at 8, 10, 11, 14, 15, 16, 17, 18, 19.

1395dd(e)(1)(A)(i) (emphasis added). We refer to that provision as Subsection (i). From the beginning of its case until the Legislature called out the error, the Government misquoted Subsection (i) by silently excising the words "unborn child" and then proceeded as if the scope of EMTALA was defined by the resulting falsely worded prohibition on "'placing the health of' a pregnant patient 'in serious jeopardy.'"[11] The Government did not disclose its scope-altering excision (the Legislature had to do that), and the preliminary injunction incorporated verbatim the Government's misleading wording of Subsection (i).[12]

The purpose and effect of the Government's misquotation-by-excision of EMTALA are to require Idaho hospitals to perform abortions to treat a vague and potentially indefinite catalog of emergency medical conditions. But that false wording is exactly contrary to Congress's words and intent in the statute. EMTALA's Subsection (i) prohibits "placing the health of the individual (or, with respect to a pregnant woman, the health of the woman *or her unborn child*) in serious jeopardy." (Emphasis added). Exactly because Subsection (i) requires medical care for an unborn

---

[11] *E.g.,* Govt Proposed Order (enjoining the withholding of an abortion "that is necessary to avoid: (i) 'placing the health of' a pregnant patient 'in serious jeopardy'), Dkt. 17-2; *see also* Legislature's Brief ISO Reconsideration, Dkt. 97-1, at 3–4.

[12] *See* Mem. Dec. and Order, Dkt. 95, at 38-39.

From when it became a party in this civil action (August 13, 2022; *see* Mem. Dec. and Order, Dkt. 27), it took the Legislature less than nine days to see through the Government's excision scheme for what it was and to bring this understanding to this Court's attention. *See, e.g.,* Transcript Aug. 22, 2022 Hrg, Dkt 96, at 60, 62; *see also* Legislature's Brief ISO Reconsideration, Dkt. 97-1, at 3–4. Now the Government is saying that those nine days were "too long" and therefore the Government gets away with its excision scheme; a court is precluded from addressing it for what it is, Govt Opp. Reconsideration, Dkt. 106, at 12–13,—and that the same is true because, in exposing the excision scheme, the Legislature "exceeded" the scope of its intervenor status, *id.* at 2, 5–6. In making that last point, the Government misses the dark irony that it caused the limitation on the Legislature's intervenor status with its, the Government's, own false argument that the State through the then-Attorney General would adequately defend Idaho's interests, Govt Opp. Intervention, Dkt. 23, at 3, 5–7, a false argument this Court accepted. Mem. Dec. and Order, Dkt. 27, at 12–14. The then-Attorney General did not see and therefore did not expose the Government's excision scheme.

child, EMTALA does not mandate abortion procedures as stabilizing care. That is the holding of the court in *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 at *18–25 (N.D. Tex. Aug. 23, 2022).

There the court, in the context of the same conflict/preemption issue presented here, thoroughly analyzed EMTALA's Subsection (i), including the "unborn child" language both here and there (by an administrative "Guidance") wrongly excised with the same purpose and effect—to make it appear that EMTALA requires abortions as stabilizing emergency medical treatment. The *Becerra* court saw through that misleading artifice and held no preemption. *Id.* at *18–25.[13] Perceptively, the *Becerra* court also saw that the Administration's misquotation-by-excision project "is at the heart of the Idaho suit." *Id.* at *18. Here is that court's reasoning:

> This case presents [this] question: Does a 1986 federal law ensuring emergency medical care for the poor and uninsured, known as EMTALA, require [or, here, allow] doctors to provide abortions when doing so would violate state law? Texas law already overlaps with EMTALA to a significant degree, allowing abortions in life-threatening conditions and for the removal of an ectopic or miscarried pregnancy. . . . [The HHS] Guidance goes well beyond EMTALA's text, which protects both mothers and unborn children, is silent as to abortion, and preempts state law only when the two directly conflict. Since the statute is silent on the question, the Guidance cannot answer [and EMTALA cannot direct here] how doctors should weigh risks to both a mother and her unborn child. Nor can it, in doing so, create a conflict with state law where one does not exist.

Id. at *1.

Becerra unsparingly rejected the same arguments urged here:

[13] The court understandably felt to take the Government to the woodshed over its misquotation. *Becerra*, 2022 WL 3639525 at *25:

> In such a case, the Court finds it difficult to square a statute that instructs physicians to provide care for both the pregnant woman and the unborn child with purportedly explanatory guidance excluding the health of the unborn child as a consideration when providing care for a mother. If there ever were a time to include the full definition of an emergency medical condition, the abortion context would be it.

> [T]he Court concludes that the Guidance [as does the Government's case here] extends beyond EMTALA's authorizing text in [two ways relevant here] . . .: it discards the requirement to consider the welfare of unborn children when determining how to stabilize a pregnant woman; [and] it claims to preempt state laws notwithstanding explicit provisions to the contrary . . . .

Id.; *see also id*. at 20, 23–25 (addressing the Government's excision of "unborn child" from Subsection (i)), 21–23 (ruling that EMTALA does not preempt state law like Section 622).

Despite having the chance to do so here, the Government has given no good answer to the *Becerra* court's analysis.[14]

Becerra has it right. EMTALA is a decades-old statute "ensuring emergency medical care for the poor and uninsured"—not a national abortion mandate. *Becerra*, 2022 WL 3639525 at *1. Covered facilities can satisfy EMTALA's requirement to furnish emergency medical care to pregnant mothers and unborn children while fully complying with Section 622. EMTALA, therefore, does not preempt Section 622. Without a federal/state conflict to support it, the sole legal basis for the preliminary injunction collapses. It should be vacated—promptly.

Lastly, we note that Subsection (i) has two companion subsections. Subsections (ii) and (iii) prohibit withholding treatment when doing so will lead to "(ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." Those two subsections, which, unlike Subsection (i), do not relate to abortion, cannot save the preliminary injunction, for two reasons. *One*, *Becerra's* correct analysis of EMTALA in the abortion context.

Two, Section 622 does not conflict with EMTALA's Subsections (ii) and (iii)—even if they are somehow applicable to abortions, which they are not. Section 622's "subjective physician

[14] *Compare* Legislature's Memo ISO Reconsideration, Dkt. 97-1, at 2–7 *with* Govt Opp. re Reconsideration, Dkt. 106, at 5–6 (urging this Court to turn a blind eye to the Government's misquotation project because "[t]he Legislature has exceeded the scope of its permitted intervention" in calling attention to that project) *and id*. at 12–16.

judgment/life of the pregnant woman" exception[15] and related provisions mean that the Idaho statute allows the same treatments required by EMTALA under Subsections (ii) and (iii). The Legislature and its expert witnesses have so shown.[16] It follows that EMTALA does not conflict with and cannot preempt Section 622.[17] That the Government's experts heavily relied on an understanding of an EMTALA that does *not* require protection of an unborn child renders their opinions fatally defective.[18]

IV. The Government's deliberate elision of EMTALA's language protecting unborn children shows why the Government's case violates the major questions doctrine.

Excising EMTALA's reference to the protection of unborn children has a second unconstitutional result. Its excision of language from the statute is compelling evidence that the

[15] There is no crime under Section 622 if "the physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3)(a)(ii).

[16] *E.g.,* Legislature's Opp. Prel. Inj., Dkt. 65, at 1–8, 10–13; Decl. Dr. Tammy Reynolds, Dkt. 71-1 (*passim*); Decl. Dr. Richard Scott French, Dkt. 71-5 (*passim*); *see also* Legislature's Reply re Intervention, Dkt. 25, at 2–7.

[17] *See* Decl. Dr. Reynolds, Dkt. 71-1; Decl. Dr. French, Dkt. 71-5.

[18] There is no escaping the reality that the Government's doctor-declarants' pervasively based their opinions on a view of EMTALA devoid of regard for the unborn child. *E.g*., Decl. Fleisher, Dkt. 17-3, at ¶ 12 (repeated use of the excision, concluding that "EMTALA does not allow leaving the patient [woman only] untreated when doing so would irreparably risk or harm their [the woman's] health"), ¶ 16 (tracking the excision with "failure to provide the necessary treatment will seriously jeopardize the patient's [the woman's] health"), ¶ 18 (same), ¶ 20 (same), ¶ 22 (same), ¶ 23 ("Myriad other medical conditions that present in pregnant patient's may cause acute symptoms that place the health of the pregnant patient in serious jeopardy"), ¶ 25 (opining "that the patients will suffer . . . serious jeopardy to their health without such treatment"); Supp. Decl. Fleisher, Dkt. 86-2, at at ¶ 3 ("the State's declarations do not address situations in which termination of pregnancy is necessary to protect a patient's health"), ¶ 3 ("Under those circumstances, terminating the pregnancy to avoid the patient's health falling into serious jeopardy . . . is what EMTALA requires."); Supp. Decl. Corrigan, Dkt. 86-3, at ¶ 8 ("in each case [described by this doctor in her two declrations], abortion was necessary to stabilize the patient's health."), ¶ 9 (referencing her erroneously understood "obligations under EMTALA"); Decl. Cooper, Dkt. 17-7, at ¶ 12 (speaking only to the care of her women patients, without regard to the non-patient unborn child).

Government is attempting to exercise executive power over questions of economic or political significance beyond the terms fixed by Congress. Supreme Court experts label the doctrine controlling in such cases the major questions doctrine.

Under that doctrine, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). When the rule applies "something more than a merely plausible textual basis for the agency action is necessary." *W. Va. v. EPA*, 142 S. Ct. 2587, 2609 (2022). In this way, the major question doctrine resolves the problem of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* And three recent Supreme Court decisions have relied on the major questions doctrine to declare controversial Administration initiatives unconstitutional.[19]

The major questions doctrine likewise applies here.

EMTALA's Subsection (i) prohibits the emergency rooms of covered hospitals from "placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy." 42 U.S.C. § 1395dd(e)(1)(A)(i). Excluding the unborn child from that protective language expands executive power. The Government's truncated version of Subsection (i) operates to empower the President and federal agencies to direct Idaho's hospitals to perform an abortion whenever the "pregnant person's" health is deemed to be in "serious jeopardy" and without any regard to the health of the unborn child. Yet the face of the statute

[19] *W. Va. v. EPA*, *supra*, 142 S. Ct. at 2616 (invalidating an EPA rule because "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body"); *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (setting aside an OSHA standard requiring large employers to ensure that their employees were vaccinated against COVID-19); *Alabama Assoc. of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (voiding a nationwide eviction moratorium imposed by the Centers for Disease Control).

leaves no doubt that Congress intended to require emergency medical care when "the health of the [pregnant] woman *or her unborn child*" stands in "serious jeopardy." *Id.* (emphasis added). So it is certain that the Government's misquote of Subsection (i) operates to permit, indeed, mandate far more abortions than permitted by Congress's own language. In this fashion, a statute requiring federally funded hospitals to provide emergency care to all patients—including unborn children—is transformed into a national abortion mandate.

Because federal control over state abortion law is indisputably a matter of "vast … political significance," *Utility Air Regulatory Group*, 573 U.S. at 324, the Government must produce "more than a merely plausible textual basis" to justify its assault on Idaho's authority to regulate abortion. That it has not been done and cannot do. Like the CDC's eviction moratorium, the Government's weaponization of EMTALA seizes "a breathtaking amount of authority," *Ala. Assoc. of Realtors*, 141 S. Ct. at 2489, by rewriting EMTALA rather than enforcing it.

Conclusion

In light of all the foregoing, the Legislature respectfully submits that the facts, the law, and equity require this Court to withdraw the preliminary injunction. The Legislature further respectfully urges this Court to rule on the pending motions for reconsideration with the same speed and dispatch it exhibited when ruling on the Government's motion for the preliminary injunction.

Finally, the Legislature endorses and adopts the State's Supplemental Brief filed this day.

Date: February 6, 2023

Respectfully submitted,
MORRIS BOWER & HAWS PLLC

By: */s/ Daniel W. Bower*
Daniel W. Bower

/s/ Monte Neil Stewart
Monte Neil Stewart
Attorneys for the Legislature

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court via 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:

BRIAN DAVID NETTER
DOJ-Civ
Civil Division
brian.netter@usdoj.gov

DANIEL SCHWEI
DOJ-Civ
Federal Programs Branch
daniel.s.schwei@usdoj.gov

JULIE STRAUS HARRIS
DOJ-Civ Civil Division,
Federal Programs Branch
julie.strausharris@usdoj.gov

LISA NEWMAN
DOJ-Civ Civil Division,
Federal Programs Branch
lisa.n.newman@usdoj.gov

ANNA LYNN DEFFEBACH
DOJ-Civ
Civil Division,
Federal Programs Branch
anna.l.deffebach@usdoj.gov

CHRISTOPHER A. EISWERTH
DOJ-Civ
Federal Programs Branch
christopher.a.eiswerth@usdoj.gov

EMILY NESTLER
DOJ-Civ
emily.b.nestler@usdoj.gov

Attorneys for Plaintiff United States of America

Raul Labrador
raul.labrador@ag.idaho.gov
David Dewhirst
david.dewhirst@ag.idaho.gov
Theo Wold
theo.wold@ag.idaho.gov
Brian Church
brian.church@ag.idaho.gov
Steven Lamar Olsen
steven.olsen@ag.idaho.gov
Alan Wayne Foutz
alan.foutz@ag.idaho.gov
Office of the Attorney General

JOAN E. CALLAHAN
NAYLOR & HALES, P.C.
Special Deputy Attorney General
jec@naylorhales.com

Attorneys for Defendant

JAY ALAN SEKULOW
sekulow@aclj.org
JORDAN A. SEKULOW
jordansekulow@aclj.org
STUART J. ROTH
Stuartroth1@gmail.com
OLIVIA F. SUMMERS
osummers@aclj.org
LAURA B. HERNANDEZ
lhernandez@aclj.org

Attorneys for Amicus Curiae American Center for Law & Justice

LAURA ETLINGER
New York State Office
of the Attorney General
laura.etlinger@ag.ny.gov

Attorney for Amici States California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Washington, D.C.

THOMAS MOLNAR FISHER
Office of IN Attorney General
Solicitor General
tom.fisher@atg.in.gov

Attorney for Amici States Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming

WENDY OLSON
Stoel Rives LLP
wendy.olson@stoel.com

JACOB M. ROTH
AMANDA K. RICE
CHARLOTTE H. TAYLOR
Jones Day
jroth@jonesday.com
arice@jonesday.com
ctaylor@jonesday.com

Attorneys for Amici Curiae The American Hospital Association and the Association of American Medical Colleges

SHANNON ROSE SELDEN
ADAM B. AUKLAND-PECK
LEAH S. MARTIN
Debevoise & Plimpton LLP
srselden@debevoise.com
Aaukland-peck@debevoise.com
lmartin@debevoise.com

JEFFREY B. DUBNER
JOHN LEWIS
MAHER MAHMOOD
Democracy Forward
jdubner@democracyforward.org
jlewis@democracyforward.org
mmahmood@democracyforward.org

Attorneys for Amici Curiae American Academy of Family Physicians; American Academy of Pediatrics; American College of Emergency Physicians; American College of Obstetricians and Gynecologists; American Medical Association; American Public Health Association; Idaho Chapter of the American College of Emergency Physicians; National Hispanic Medical Association; National Medical Association; and Society for Maternal-Fetal Medicine

/s/ Daniel W. Bower
Daniel W. Bower

EXHIBIT 1

Daniel W. Bower, ISB #7204
MORRIS BOWER & HAWS PLLC
1305 12th Ave. Rd.
Nampa, Idaho 83686
Telephone: (208) 345-3333
Facsimile: (208) 345-4461
dbower@morrisbowerhaws.com

Monte Neil Stewart, ISB #8129
11000 Cherwell Court
Las Vegas, Nevada 89144
monteneilstewart@gmail.com

Attorneys for Defendant-Intervenor Idaho Legislature

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-00329-BLW **THE LEGISLATURE'S JOINDER IN THE STATE OF IDAHO'S REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL BRIEFING, DKT. # 119, AND MOTION TO STAY ISSUANCE OF A DECISION, DKT. # 120**

The Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively "Legislature") hereby join in the "State of Idaho's Request for Permission to File Supplemental Briefing," Dkt. #119, and "State of Idaho's Motion to Stay Issuance of a Decision," Dkt. #120, filed on January 13, 2023, and submit as supplemental authority the opinion of the Idaho Supreme Court in

Planned Parenthood Great Northwest v. State, No. 49615, 2023 WL 110626 (Idaho Jan. 5, 2023) ("Opinion"), attached as Exhibit 1. The Opinion is relevant to the Legislature's pending Motion for Reconsideration of Order Granting Preliminary Injunction, Dkt. 97, for three reasons.

First, the Opinion puts to rest a basic misunderstanding of Idaho law that has plagued this case. The United States ("Government") has insisted on interpreting Idaho Code § 18-622 to mean that terminating an ectopic pregnancy is a "criminal abortion." *E.g.,* Gov't Memo. in Supp. of Prel. Inj., Dkt. 17-1, at 2, 9, 18; Gov't Reply Memo. in Supp. Of Prel. Inj., Dkt. 86, at 8-10, 15-16; Consol. Opp. to Motions for Reconsideration, Dkt. 106, at 18. Not only that, but the Government's declarants *materially* premised their opinions on this same erroneous reading of Section 622. *E.g.,* Declaration of Lee A. Fleisher, M.D., Dkt. 17-3, at ¶¶ 13, 14, 26, 32, 36, 37[1]; Declaration of Dr. Emily Corrigan, Dkt. 17-6, at ¶¶ 31–33, 35; Declaration of Kylie Cooper, M.D., Dkt. 17-7, at section entitled "Idaho Code 18-622 and the impact on patients and providers," ¶¶ 4

[1] Here is a representative paragraph from Dr. Fleisher's declaration exemplifying how thoroughly the Government's declarants rely on an erroneous interpretation of Section 622 for their medical opinions:

> Even though a physician at a hospital where EMTALA applies could conclude that this treatment is required for an ectopic pregnancy, particularly one involving a fallopian tube, Idaho law prohibits this treatment. Idaho's definition of abortion would include both the medical and surgical treatment described in ¶ 13, because both cause embryonic or fetal demise in a clinically diagnosable pregnancy. This treatment would be prohibited by Idaho law even though an ectopic pregnancy has no chance of maturing into a viable child. Additionally, despite the extremely serious risks posed by an ectopic pregnancy, particularly in a fallopian tube, and the inevitability of a rupture, which are apparent at the time when treatment is required to address those risks, a physician may not be able to establish or know, with certainty, that termination of the pregnancy is 'necessary to prevent the death of the woman.' However, that does not change the fact that the patient's condition will very likely deteriorate without the necessary treatment, and that failure to provide the necessary treatment will seriously jeopardize the patient's health and or life in the ponrocess.

Declaration of Lee A. Fleisher, M.D., Dkt. 17-3, at ¶ 14.

et seq.; Declaration of Stacy T. Seyb, M.D., Dkt. 17-8, at section entitled "Idaho Code 18-622 and the impact on patients and providers," ¶¶ 4 *et seq*.; Second Declaration of Lee A. Fleisher, M.D., Dkt. 86-2, at ¶¶ 3 *et seq*. (attempting to refute the testimony of the Legislature's declarants based on their *correct* interpretation of Section 622); Second Declaration of Dr. Emily Corrigan, Dkt. 86-3, at *passim* (same); Declaration of Dr. Amelia Huntsberger, Dkt. 86-4, at ¶¶ 9, 10 (giving her erroneous reading of Section 622 to refute Dr. Tammy Reynolds's *correct* reading), 11, 12, 13, 16; Second Declaration of Kylie Cooper, M.D., Dkt. 86-5, at ¶ 7 (giving her erroneous reading of Section 622 to refute Dr. Tammy Reynolds's *correct* reading).

The Legislature and its declarants tried to correct this misunderstanding by explaining that Section 622 did not cover ectopic pregnancies. *E.g.,* Legislature's Reply re Intervention, Dkt. 25, at 2 ("Ectopic 'pregnancies' fall *outside* the 622 Statute's prohibition. That is the Legislature's clear understanding and intent, one shared by the executive branch.")(emphasis in original); Idaho Legislature's Brief in Opposition to the Government's Motion for Preliminary Injunction, Dkt 65, at 3, 6–7; Declaration of Tammy Reynolds, M.D., Dkt. 71-1, at ¶ 12; Declaration of Richard Scott French, M.D., Dkt. 71-5, at ¶¶ 17–20.

Yet this Court was not satisfied with the Legislature's clear reading of its own statute and pushed for an interpretation more in harmony with the Government's position. During the hearing on the preliminary injunction, this Court asked Deputy Attorney General Brian Church his opinion, and he opined that Section 622 covered medical procedures terminating ectopic pregnancies. *See* Tr. Proceedings, Aug. 22, 2022, Dkt. 96, at 24:24–25:4 (opining that "if you end that [ecotopic] pregnancy through an abortion … that that would be an abortion") (punctuation altered). Counsel for the Legislature strenuously disputed that interpretation. *Id.* at 66:17–19 ("An ectopic pregnancy is not an abortion. Why? Because it will never result in a live birth ….").

This Court accepted Mr. Church's—and the Government's and the Government declarants'—erroneous reading of the statute. *United States v. Idaho*, Case No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *3 (D. Idaho Aug. 24, 2022) ("[D]uring oral argument, the State conceded that the procedure necessary to terminate an ectopic pregnancy is a criminal act."). Based on this concession, and its own reading of Section 622, this Court concluded that "termination of an ectopic pregnancy falls within the [statutory] definition of an 'abortion.'" *Id.* at *9.

Now, however, the Idaho Supreme Court has said otherwise. Its Opinion—binding as to the meaning of Idaho law—conclusively holds that "ectopic and non-viable pregnancies do not fall within the Total Abortion Ban's [Section 622's] definition of 'abortion.'" *Planned Parenthood Great*, 2023 WL 110626, at *7. Here is the Idaho Supreme Court's meticulous explanation:

> The Total Abortion Ban only prohibits "abortion[s] as defined in [Title 18, Chapter 6]," I.C. § 18-622(2)—and ectopic and non-viable pregnancies do not fall within that definition. For purposes of the Total Abortion Ban, the only type of "pregnancy" that counts for purposes of prohibited "abortions" are those where the fetus is "developing[.]" *See* I.C. §§ 18-622(2), -604(11) (defining "pregnancy" as "the reproductive condition of having a *developing fetus in the body* and commences with fertilization." (emphasis added)). In the case of ectopic pregnancies, any "possible infirmity for vagueness" over whether a fetus could properly be deemed a "developing fetus" (when the fallopian tube, ovary, or abdominal cavity it implanted in *necessarily cannot support its growth*) can be resolved through a "limiting judicial construction, consistent with the apparent legislative intent[.]" *See Cobb*, 132 Idaho at 198–99, 969 P.2d at 247–48.
>
> Consistent with the legislature's goal of protecting prenatal fetal life at all stages of development where there is *some* chance of survival outside the womb, we conclude a "developing fetus" under the definition of "pregnancy" in Idaho Code section 18-604(11), does not contemplate ectopic pregnancies. Thus, treating an ectopic pregnancy, by removing the fetus is plainly not within the definition of "abortion" as criminally prohibited by the Total Abortion Ban (I.C. § 18-622(2)). In addition, because a fetus must be "developing" to fall under the definition of "pregnancy" in Idaho Code section 18-604(11), non-viable pregnancies (i.e., where the unborn child is no longer developing) are plainly not within the definition of "abortion" as criminalized by the Total Abortion Ban (I.C. § 18-622(2)).

Id. at *59.