No. 23-35153

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiffs-Appellee,

v.

STATE OF IDAHO

Defendant-Appellee,

THE SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, MIKE MOYLE; IDAHO STATE SENATE PRESIDENT PRO TEMPORE, CHUCK WINDER; AND THE SIXTY-SEVENTH IDAHO LEGISLATURE

Defendants-Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
No. 1:22-cv-00329-BLW • Hon. B. Lynn Winmill

APPELLANT'S EXCERPTS OF RECORD INDEX VOLUME

Daniel W. Bower, ISB #7204
Morris Bower & Haws PLLC
1305 12th Avenue Road
Nampa, Idaho 83686
Telephone: 208-345-3333
dbower@morrisbowerhaws.com

Monte Neil Stewart, ISB #8129
11000 Cherwell Court
Las Vegas, Nevada 89144
Telephone: 208-514-6360
monteneilstewart@gmail.com

Attorneys for Defendants-Intervenors-Appellants
THE SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, MIKE MOYLE; IDAHO STATE SENATE PRESIDENT PRO TEMPORE, CHUCK WINDER; AND THE SIXTY-SEVENTH IDAHO LEGISLATURE

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Daniel W. Bower, ISB #7204
Morris Bower & Haws PLLC
1305 12th Avenue Road
Nampa, Idaho 83686
Telephone: 208-345-3333
dbower@morrisbowerhaws.com

Monte Neil Stewart, ISB #8129
11000 Cherwell Court
Las Vegas, Nevada 89144
Telephone: 208-514-6360
monteneilstewart@gmail.com

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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

MEMORANDUM DECISION AND ORDER

INTRODUCTION

The United States of America filed this case against the State of Idaho on August 2, 2022, challenging Idaho Code § 18-622(2), which makes it a felony for anyone to perform or attempt to perform or assist with an abortion. The United States maintains that the law violates the Supremacy Clause and is preempted to the extent it is contrary to the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd. On August 24, 2022, the Court issued a decision granting the United States' motion for a preliminary injunction (Dkt. 95).

Prior to issuing the decision, the Court allowed the Idaho Legislature to permissively intervene on a limited basis to present argument and evidence in opposition to the United States' then-pending motion for preliminary injunction. *Memorandum Decision and Order, dated August 13, 2022*, p. 1, Dkt. 27

("Intervention Order"). In this same decision, the Court denied the Legislature's request to intervene as a matter of right. *Id.* This decision denying intervention as of right rested on the Court's determination that "the Legislature has failed to show that it brings a distinct state interest to bear on this litigation that the State cannot adequately represent." *Id.* at 12.

The Legislature now renews its request to intervene in this action as a matter of right, reprising its argument that the United States Supreme Court's decision in *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022) mandates its right to intervene. (Dkt. 27). The Legislature further argues that "the facts have developed [in this litigation] such that it is now abundantly clear that 'the State and Legislature's interests diverge,'" and therefore intervention of right is warranted. *Leg. Opening Br.*, p. 6, Dkt. 105-1. Both the Legislature and the State of Idaho ask the Court to reconsider its decision granting the United States' motion for preliminary injunction. Those motions remain pending.

With respect to the Legislature's renewed motion to intervene, nothing has transpired in this litigation to cause the Court to reconsider its prior decision denying the Legislature's request to intervene as a matter of right. To the contrary, the facts as they have developed only serve to underscore that the Legislature and the State's interests overlap fully such that the State will adequately represent the Legislature's interests. The Court will therefore deny the Legislature's renewed

motion to intervene as a matter of right.

LEGAL STANDARD

The Federal Rules of Civil Procedure permit a party to intervene as of right under Rule 24(a). *Cooper v. Newsom*, 13 F.4th 857, 864 (9th Cir. 2021). An applicant for intervention as of right must satisfy four criteria under Rule 24(a)(2): "(1) the application for intervention must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit." *Animal Legal Def. Fund v. Otter*, 300 F.R.D. 461, 464 (D. Idaho 2014) (citing *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001)); *see also Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) (citing Fed. R. Civ. P. 24(a)(2)).

"In evaluating whether these requirements are met, courts are guided primarily by practical and equitable considerations." *Callahan v. Brookdale Senior Living Communities, Inc.*, 42 F.4th 1013, 1020 (9th Cir. 2022) (internal quotation marks and citation omitted). Although courts construe Rule 24(a) broadly in favor of proposed intervenors, *id.*, an applicant seeking intervention bears the burden of

proving that these requirements are met. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). Failure to satisfy any one of the requirements is fatal to the application." *Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

ANALYSIS

Since the United States Supreme Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (June 24, 2022), overruling *Roe v. Wade*, 410 U.S. 113 (1973) and "triggering" the abortion ban in Idaho Code § 18-622(2), the State of Idaho has vigorously defended the law. As the Court noted in its prior decision on the Legislature's motion to intervene, Governor Brad Little "has consistently offered his full-throated support for *Roe's* overruling and for [Idaho Code § 18-622(2)]." *Intervention Order*, pp. 3-4, Dkt. 27. Governor Little lauded the *Dobbs* decision when it was issued, stating the decision was "the culmination of pro-life efforts to defend the defenseless – preborn babies who deserve protection," as well as an "affirmation of states' rights, a fundamental aspect of our American government." *Id.* He also commended Idaho for being at "the forefront of enacting new laws to protect preborn babies." *Id.*[1]

[1] *Gov. Little Comments on SOCUTS Overrule of Roe v. Wade, dated June 24, 2022,* https://gov.idaho.gov/pressrelease/gov-little-comments-on-scotus-overrule-of-roe-v-wade/ (last visited February 3, 2023).

The Idaho Attorney General's office, which represents the State of Idaho in this matter, also fought for Roe's overruling and has consistently demonstrated its strong support for Idaho Code § 18-622(2) – both before the Idaho Supreme Court and here in federal court. In this litigation, the Attorney General's office, representing the State, has mounted a robust defense of the abortion ban – vigorously opposing the United States' motion for preliminary injunction in its briefs and in oral argument and now seeking to reverse this Court's ruling granting the injunction. Through its newly elected Attorney General, Raul Labrador, the State is even more vociferous in its defense of Idaho Code § 18-622(2). Attorney General Labrador has stated that he "will stand up to the bullies in D.C. and defend Idaho's duly enacted laws [intended to protect] the rights of the unborn."[2]

Yet, the Legislature continues to insist that the State of Idaho has interests in this lawsuit distinct from its own and that the State has not and will not adequately represent its interests. As evidence for this claim, it cites to "differing litigation aims and tactics" between it and the State. The Legislature stresses, however, that it is unnecessary to delve into these differences to justify its intervention because *Berger* holds "that federal courts should permit intervention as of right when a

[2] *Jones: Attorney General Candidates Disagree on Emergency Room Medical Care, dated August 28, 2022*, https://www.idahopress.com/opinion/columnists/jones-attorney-general-candidates-disagree-on-emergency-room-medical-care/article_125a6908-255e-11ed-99e1-9f8d869152ac.html (last visited February 3, 2023).

state applicant demonstrates that a state law expressly authorizes such intervention." *Leg. Opening Br.*, p. 5, Dkt. 105-1. But, respectfully, this overstates *Berger's* holding.

In *Berger*, the Supreme Court held "that a presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." *Berger*, 142 S. Ct. at 2204. It did not say that a state agent should *always* be allowed to intervene in federal court when authorized by state law. Rather, the Court observed that the *Berger* litigation "illustrate[d] how divided state governments *sometimes* warrant participation by multiple state officials in federal court." *Id*. at 2205 (emphasis added). But, as explained in the Court's first intervention order, this case is not *Berger*.

Unlike in *Berger*, the Legislature here does not offer "to give voice to a different perspective." *Berger*, 142 S. Ct. as 2205 ("The legislative leaders seek to give voice to a different perspective."). Unlike in Berger, the State and the Legislature do not have differing "primary objectives." *Id.* ("[The legislative leaders'] 'primary objective' is not clarifying which law applies."). Unlike in *Berger*, the State is not "burdened by misgivings about the law's wisdom." *Id.* (The legislative leaders "are not burdened by misgivings about the law's wisdom."). Unlike in *Berger*, the State has no other focus or concerns in this litigation other than vigorously defending the abortion ban on the merits. *Id.* ("If

allowed to intervene, the legislative leaders say, they will focus on defending the law vigorously on the merits without an eye to crosscutting administrative concerns."). And, unlike in *Berger*, nothing about this case indicates that the State and the Legislature, as different branches of state government "may seek to vindicate different and valuable state interests." *Id.* ("And, they add, the differences between their interest and the Board's in this case demonstrate why state law empowers them to participate in litigation over the validity of state legislation—alive as it is to the possibility that different branches of government may seek to vindicate different and valuable state interests.").

This latter point is a key distinction between this case and *Berger*: this case does not involve a plaintiff who has chosen "to name this or that official defendant," thus failing to "capture all relevant state interests." *Berger*, 142 S. Ct. at 2203. Rather, the United States has sued the State of Idaho, and the State's interests, by definition, encompass the Legislature's interests. Under these circumstances, not allowing the Legislature to intervene does not "evince disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials." *Id.* at 2201. It does not "risk turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests." *Id.* It does not "encourage plaintiffs to make strategic choices to control which state agents they will face across the aisle in federal court." *Id.* It does not

"tempt litigants to select as their defendants those individual officials they consider most sympathetic to their cause or most inclined to settle favorably and quickly." *Id.* And it does not "risk a hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Id.*

Simply put, both formally and functionally, this *is* the case where the interests of the existing party overlap fully with the interests of the proposed intervenor. The Court therefore stands by its original finding that the State has and will adequately represent the Legislature's interests in this litigation. *Cf. Berger*, 142 S. Ct. at 2205 ("At some point, too, it may be that the interests of existing parties will come to overlap fully with the interests of any remaining proposed intervenor."); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), as amended (May 13, 2003) ("The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties.").

None of the procedural quibbles the Legislature identifies as proof of the State's inadequate representation – namely, the State's filing its motion to reconsider two weeks after the Legislature filed its motion, or the State's failing to object to the United States' request for a two-week extension to respond to the Legislature's motion to reconsider – change this conclusion. The Legislature argues that the State's "chosen briefing schedule and its concessions to the

government have put off a decision on the Legislature's Motion [to Reconsider] for months." *Leg. Reply*, p. 9, Dkt. 113. But this is simply not true.

First, as a matter of logic, it does not follow that a delay of two weeks translates to a delay "for months." Second, as a matter of fact, the Court can assure the Legislature that the State's supposed "delays in acting on the Legislature's Motion for Reconsideration" did not result in the Court's putting off its decision on the Legislature's Motion "for months"; other factors, primarily the fact this Court remains overburdened, caused this delay.[3] Finally, the Court notes the Legislature recently joined in the State's motion to stay the issuance of a decision on the motions to reconsider to allow for supplemental briefing – undercutting the Legislature's claims of "urgency" that differ so "sharply" with that of the State.

[3] Idaho is one of only three states with only two authorized judgeships. As noted in a recent press release issued by U.S. Senators Jim Risch and Mike Crap (both R-Idaho), Idaho faces a judicial emergency as a result:

> Since the second district judge was authorized in 1954, Idaho's population has grown substantially, and the court indicates that its caseload has increased exponentially. This leaves Idaho at a disadvantage compared to other similarly sized states. Since 2003, the Judicial Conference of the U.S. has consistently found Idaho to be facing a judicial emergency based on weighted caseload numbers per active judge and the lack of a third federal judgeship to balance caseloads. Idaho is in a precarious position with only two authorized federal judges, and faces further difficulties and shortages with current judges reaching retirement eligibility.

Risch, Crapo Introduce Legislation to Grant Idaho a Third District Judge, https://www.risch.senate.gov/public/index.cfm/pressreleases?ID=DC7151E2-842D-4D9E-A029-EBEA6B4DBF40 (last visited February 3, 2023).

That the attorneys for the State and the Legislature may have slightly different litigation strategies also does not justify the Legislature's intervention as of right. For example, the Legislature complains that the State has prioritized different legal arguments than the Legislature. Such disagreements are "minor," however, and "reflect[] only a difference in strategy." *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996), as amended on denial of reh'g (May 30, 1996) (rejecting proposed intervenor's argument that existing parties could not adequately represent its interests because the existing parties favored the court's entry of a permanent injunction as it was appealable, and proposed intervenor disagreed). These minor disagreements do not demonstrate such a divergence of interests to justify the Legislature's intervention of right.

Because the Legislature has again failed to show that the State is inadequately representing its identical interest in defending Idaho's abortion ban, its renewed motion to intervene as a matter of right is denied. As the Court did allow the Legislature to permissively intervene to oppose the United States' motion for preliminary injunction, the Court will fully consider the Legislature's motion for reconsideration.

ORDER

IT IS ORDERED that the Idaho Legislature's Renewed Motion to Intervene (Dkt. 105) is **DENIED**.

DATED: February 3, 2023

B. Lynn Winmill
U.S. District Court Judgere

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

MEMORANDUM DECISION AND ORDER

INTRODUCTION

Before the Court is a motion to intervene filed by the Idaho Legislature (Dkt. 15). For the reasons expressed below, the Court will grant the motion in part and deny it in part. The Court will deny the motion to the extent the Legislature seeks to intervene as of right. But the Court will grant permissive intervention on a limited basis to allow the Legislature to present argument and evidence (including witnesses) in opposition to the United States' pending Motion for Preliminary Injunction. As explained further below, the Legislature's participation will be limited to presenting evidence and arguments the Legislature has said will show "the holes in the 'factual' foundation" of the United States' motion. *See Legislature's Reply Br.,* Dkt. 25, at 6. Thus, the Legislature will be allowed to participate in the preliminary-injunction proceedings only – and in that limited

fashion. Otherwise, if during the course of this litigation the facts develop such that it becomes clear the State and Legislature's interests diverge, and the State can no longer adequately represent the Legislature's interests, the Court will entertain a renewed motion to intervene.

BACKGROUND

In 2020, the Idaho Legislature passed a law making it a felony for anyone to perform or attempt to perform or assist with an abortion. Idaho Code § 18-622(2). This law allows for affirmative defenses to prosecution where the abortion is necessary to prevent the death of a pregnant woman, or the pregnancy resulted from rape or incest that was reported to law enforcement. *Id.* § 18- 622(3) (the "Total Abortion Ban.") Idaho Governor Brad Little signed the bill, but the Total Abortion Ban did not become law when signed. Rather, recognizing the constitutional impediments presented by *Roe v. Wade*, 410 U.S. 113 (1973), the bill contained a provision – commonly referred to as a "trigger" – stating that the prohibition would take effect 30 days following "[t]he issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion . . . ." Idaho Code § 18-622(1)(a).

On June 24, 2022, the United States Supreme Court handed down *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (June 24, 2022), overruling *Roe* and holding that the "Constitution does not prohibit the citizens of

each State from regulating or prohibiting abortion." 142 S. Ct. at 2284. The Supreme Court's decision in *Dobbs* triggered the Total Abortion Ban, which is now set to go into effect on August 25, 2022.

Governor Little has consistently offered his full-throated support for *Roe's* overruling and for Idaho's Total Abortion Ban. In July 2021, he joined ten other governors submitting an *amicus* brief in *Dobbs*, arguing that *Roe* should be overturned and regulation of abortion should be returned to the states. (Idaho Attorney General Lawrence Wasden also joined more than 20 other attorneys general in a similar *amicus* brief.) And on the same day the Supreme Court issued *Dobbs*, Governor Little issued a press release lauding the decision and commenting that Idaho's Total Abortion Ban would take effect later this summer:

> I join many in Idaho and across the country today in welcoming the high court's long awaited decision upholding state sovereignty and protecting preborn lives. The decision provides clarity around landmark cases at the center of passionate debate in our country for nearly five decades. This is now clear – the 'right' to an abortion was a judicial creation. Abortion is not a right expressed in the U.S. Constitution, and abortion will be entrusted to the states and their people to regulate.
>
> Idaho has been at the forefront of enacting new laws to protect preborn babies. The pro-life bill I signed into law in 2020 will go into effect later this summer.
>
> Today's decision is the culmination of pro-life efforts to defend the defenseless – preborn babies who deserve protection. It also is affirmation of states' rights, a fundamental aspect of our American

government.[1]

Waiting six weeks from the issuance of *Dobbs*, and with only three weeks until the Total Abortion Ban is due to take effect, the United States of America filed this case against the State of Idaho on August 2, 2022. The United States challenges the constitutionality of the Total Abortion Ban on the grounds that it violates the Supremacy Clause and is preempted to the extent it is contrary to the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd. The United States seeks to enjoin the statute's taking effect on August 25, 2022.

The tight timeline between the United States' filing its complaint and the law's effective date necessitated the parties agree to an expedited brief schedule. The schedule proposed by the parties, and which the Court adopted, provided for the United States to file its preliminary injunction motion on August 8, the State to file its response on August 16, and the United States to file its reply on August 19 by noon Mountain Daylight Time. *Order*, Dkt. 13. The Court has scheduled the hearing on the motion for August 22, 2022.

Shortly before the United States filed its Motion for Preliminary Injunction, on the evening of August 8, the Legislature moved to intervene as an intervenor-

[1] *Gov. Little Comments on SOCUTS Overrule of Roe v. Wade, dated June 24, 2022,* https://gov.idaho.gov/pressrelease/gov-little-comments-on-scotus-overrule-of-roe-v-wade/ (last visited Aug. 13, 2022).

defendant pursuant to Federal Rule 24(a) or Rule 24(b). The Legislature seeks to intervene because, it argues, Idaho law and Rule 24 allow it to intervene as of right in any actions challenging the constitutionality of a state law, and the State will not adequately represent all of the Legislature's interests in this litigation. If denied the opportunity to intervene, it further requests permission to file an *amicus curiae* brief and participate in the August 22 hearing.

The United States does not oppose the Legislature's participation in this case as an *amicus curiae*, and it further states that it does not oppose the State's ceding some of its oral argument time to the Legislature if the State chooses to do so. But the United States opposes the Legislature's intervention on the basis that the Legislature has failed to identify any divergence between its interests and the interests of the State in this case and has failed to provide any justification that its intervention would aid the Court's decision in this case. The United States further argues that the Legislature's intervention would prejudice the United States under the expedited briefing schedule unless the Court were to take steps to mitigate the prejudice.

LEGAL STANDARD

The Federal Rules of Civil Procedure permit a party to intervene as of right under Rule 24(a) and permissively under Rule 24(b). *Cooper v. Newsom*, 13 F.4th 857, 864 (9th Cir. 2021). An applicant for intervention as of right must satisfy four

criteria under Rule 24(a)(2): "(1) the application for intervention must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit." *Animal Legal Def. Fund v. Otter*, 300 F.R.D. 461, 464 (D. Idaho 2014) (citing *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001)); *see also Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) (citing Fed. R. Civ. P. 24(a)(2)).

"In evaluating whether these requirements are met, courts are guided primarily by practical and equitable considerations." *Callahan v. Brookdale Senior Living Cmty., Inc*., --- F.4th ---, 2022 WL 3016027, at *5 (9th Cir. June 29, 2022) (internal quotation marks and citation omitted). Although courts construe Rule 24(a) broadly in favor of proposed intervenors, *id.*, an applicant seeking intervention bears the burden of proving that these requirements are met. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). Failure to satisfy any one of the requirements is fatal to the application." *Perry v. Prop. 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

By contrast, permissive intervention under rule 24(b) requires only that the

proposed intervener "have a question of law or fact in common" with the underlying action, that the request be timely made, and that the court have an independent basis for jurisdiction over the proposed intervener's claims. Fed. R. Civ. P. 24(b). When ruling on a motion for permissive intervention under Rule 24(b), a district court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Dep't of Fair Emp. & Hous. v. Lucent Techs., Inc*., 642 F.3d 728, 741 (9th Cir. 2011) (quoting Fed. R. Civ. P. 24(b)). "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Cooper*, 13 F.4th at 868.

ANALYSIS

When an applicant moves to intervene in a pending lawsuit under Federal Rule of Civil Procedure 24(a)(2), a federal court has no authority to grant the motion if an existing party to the case adequately represents the movant's interests. Fed. R. Civ. P. 24(a)(2). Here, the Legislature has failed to meet its burden of showing that the State will not adequately represent its interests in the litigation. The Legislature's failure to satisfy this requirement is fatal to its application for intervention as of right. *Perry*, 587 F.3d at 950.

As already noted, however, the Court will allow the Legislature to intervene on a limited basis, as explained in further detail below.

1. Intervention as a Matter of Right

A movant seeking intervention typically bears a "minimal" burden of showing inadequacy of representation by an existing party, and such burden is satisfied if the applicant can demonstrate that representation of its interests may be inadequate. *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2205 (2022) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). In *Berger*, the Supreme Court addressed a request by two leaders of North Carolina's state legislature to intervene in a federal lawsuit challenging a voter-identification law and explained what it takes to meet this "minimal" burden. There, the NAACP sued Executive Branch officials sympathetic to its position—namely, the Governor, who had vetoed the law after its passage and continued to actively oppose it, and members of the State Board of Elections (collectively, the "Board"), who were appointed and potentially removable by the Governor. *Id.* at 2198. The state's attorney general assumed responsibility for defending the Governor and the Board. *Id.* Like the Governor, the attorney general had opposed an earlier voter-ID law and participated in a legal challenge against it. *Id.* Further, the North Carolina attorney general's office had a history of opposing laws enacted by the legislature and declining to fully defend those laws in federal litigation. *Id.* at 2197.

After the NAACP sued these officials in *Berger,* two legislative leaders

moved to intervene on behalf of the state legislature, arguing, inter alia, that "without their participation, important state interests would not be adequately represented in light of the Governor's opposition to [the bill], the Board's allegiance to the Governor, and the attorney general's opposition to earlier voter-ID efforts." *Id.* They also claimed the Board had offered only a "tepid" defense of the law in a parallel state-court proceeding. *Id.* at 2198-99. The district court denied their motion without prejudice and again denied their renewed motion. *Id.* at 2199.

As the litigation proceeded without the legislative leaders, the NAACP moved to enjoin the Board from enforcing the voter-ID law in the upcoming litigation; by this time, the Governor had been dismissed from the suit, and only the Board members, represented by the attorney general, remained as defendants. *Id.* The legislative leaders, unsatisfied with the vigor of the Board's response to the request for injunctive release, sought to lodge an *amicus* brief, five expert reports, and several other declarations. *Id.* "At the end of the day, however, the District Court refused to consider the amicus brief and accompanying materials, struck them from the record, and granted a preliminary injunction barring enforcement of [the voter-ID law]." *Id.*

The legislative leaders appealed the ruling denying intervention. The Board also appealed the ruling granting the preliminary injunction but did not seek a stay

of the injunction because of "disruptive effect such relief would have had on election administration." *Id.* (internal quotation marks omitted). The law was therefore not enforced during the state's March 2020 primary election. *Id.* at 2200. Meanwhile, the Governor had filed an *amicus* brief in the appeal in favor of the injunction, arguing that the district court "had not gone far enough." *Id.* But the Fourth Circuit ultimately side with the legislative leaders with respect to the injunction, who had also filed an *amicus* brief opposing it, finding the district court had abused its discretion in issuing the injunction. The Fourth Circuit, however, affirmed the district court's denial of intervention in an *en banc* decision. The Supreme Court granted certiorari.

The Supreme Court reversed the Fourth Circuit's *en banc* decision, holding North Carolina's legislative leaders were entitled to intervene in the litigation. In so holding and "[c]asting aspersions on no one," the Court observed, "this litigation illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court. *Id.* at 2205. It explained how the legislative leaders requesting to intervene sought to give voice to a perspective different from that of the Board – which remained beholden to a Governor that had vetoed the law at issue and who had filed his own briefs in the litigation, "calling the law 'unconstitutional' and arguing that it 'should never go into effect,'" and which at all times had been represented by an attorney general

who publicly opposed an earlier version of the law. Critically, the Board had also conceded in the parallel state-court proceedings "that its 'primary objective' wasn't defending [the law], but obtaining guidance regarding which law it would need to enforce in an upcoming election ([the current law being challenged] or preexisting law)." *Id.* at 2199. Thus, the Board, more concerned about the state's interest in "stability and certainty," had aimed its focus in the litigation on obtaining guidance for the administration of upcoming elections – instead of focusing wholeheartedly on defending the law from the constitutional challenge. *Id.*

By contrast, the legislative leaders remained unburdened "by misgivings about the law's wisdom" and, if allowed to intervene, had pledged to focus solely on "defending the law vigorously on the merits, without an eye to crosscutting administrative concerns" – concerns that had plagued the Board's defense throughout the litigation. *Id.* This "unalloyed interest in vindicating the law from constitutional challenge," *id.* at 2196, the Supreme Court reasoned, set the legislative leader's interests apart from the interests of the Board, who were more concerned with election administration than defending the law. *Id.* at 2205. Because the legislative leaders had shown that they sought to vindicate valuable state interests distinct from the Board's interests – and had further shown that the Board's preoccupation with administrative concerns and its allegiance to a Governor, who opposed the law, prevented it from adequately representing those

distinct interests – the Supreme Court held that the legislative leaders had a right to intervene in the litigation. *Id.*

In this case, unlike in *Berger*, the Legislature has failed to show that it brings a distinct state interest to bear on this litigation that the State cannot adequately represent – even given the Legislature's minimal burden. As just discussed, in *Berger*, the legislative leaders provided evidence that the existing state defendants' "primary objective" in the litigation differed from their own *and* that existing state defendant's preoccupation with these other interests, together with their misgivings about the wisdom of the law, prevented them from providing a full-throated defense of the law on the merits. But no such concerns exist here. The Idaho Legislature can point to no evidence that the State, represented by the Attorney General, has expressed any misgivings about the Total Abortion Ban, or that the State is concerned with interests distinct from the Legislature's that would prevent it from focusing solely on "defending the law vigorously on the merits," without an eye to other concerns. Nor has the Attorney General ever publicly opposed the Total Abortion Ban or a similar law, and nothing otherwise indicates that he would decline to defend it. To the contrary, all signs lead to the conclusion that not only does the State assert "an unalloyed interest" in vindicating the law from constitutional challenge, indicating it will offer the most robust defense of the law, but also that the State and Legislature's interests are fully aligned in this litigation.

Despite this reality, the Legislature claims that it has a "*unique interest, the interest that is really at stake here*—its unique power and authority and duty to answer the hard questions posed by abortion," such as "What is the moral value of a preborn child?," or "In what situations are the mother's interests more weighty than the moral value and interests of the preborn child?" *Legislature's Reply Br.*, Dkt. 25, at 8 (emphasis in original). The Legislature maintains only it can answer these questions, and not the executive branch. *Id.* But the United States has not sued any executive branch officials; instead, it has sued the State, and the Legislature utterly fails to explain how it is uniquely positioned – separate and apart from the State – to answer these questions. The Legislature's criticism of the Executive Branch in this case is particularly puzzling given Governor Little's statements unequivocally supporting the *Dobbs* decision and the Total Abortion Ban. Likewise, as noted, all indications suggest that the Attorney General remains fully on board in defending the law.

In fact, to this point, the Legislature has presented no credible argument that it itself is distinct from the "the State," either formally or functionally for purposes this litigation, and therefore a "new" party entitled to intervene under Rule 24(a). Again, this case is distinguishable from *Berger* in that the United States has not sued particular officers of the State but rather the State itself. As the United States argues, "[b]y virtue of being part of the State of Idaho itself, the Idaho Legislature

is *already* a party, and the Legislature articulates no reason why this Court should grant intervention when the State is *already* a party. *United States Resp.* at 6, Dkt. 23 (citing *Berger*, 142 S. Ct. at 2203) (rejecting the argument that "the legislative leaders are already effectively 'existing' parties to this suit" because the plaintiff "has not sued the State"). And, critically, as the United States also points out, because the State itself is the defendant, the practical concerns animating *Berger* do not exist here: there is no risk United States has "select[ed] as their defendants those individual officials [it] consider[s] most sympathetic to [its] cause or most inclined to settle favorably and quickly." *Id.* at 2201. Indeed, even if the United States tried, it is difficult to see what state official it could have picked who it may have considered more sympathetic to its cause or who would have been more inclined to settle this case favorably and quickly. In this case, the State appears fully united thus far.

In sum, the Court finds the circumstances of this case readily distinguishable from *Berger* and further finds that the Legislature has failed to show it seeks "to give voice to a different perspective" than the State's, or that the State will not adequately represent the Legislature's interests. Even as it is, *Berger* will make litigation in federal court involving states far more burdensome. As Justice Sotomayer noted in her dissent, "[i]t is difficult to overstate the burden the Court's holding [in *Berger*] will foist on district courts." *Id.* at 2211. But to ignore

distinctions between this case and *Berger* – and to allow a legislature the right to intervene in every federal case whenever it says it should be allowed to do so *and* without requiring the legislature to meet even its minimal burden of showing it possesses a distinct interest or that its interests are inadequately represented – would allow a state to turn into a nine-headed Hydra whenever it so chooses. This Court does not read *Berger* as intending or permitting such a result in a case such as this one – where not a speck of evidence exists that the State and the Legislature's interests diverge in any real and practical sense. This Court therefore finds that the Legislature has shown no right to intervene in this case – at least at this stage in the litigation.

As explained below, however, the Court will allow the Legislature to permissively intervene for the limited purpose of opposing the United States' motion for preliminary injunction, including an opportunity to present witnesses at the August 22 hearing if it so chooses.

2. Permissive Intervention

"A district court may grant permissive intervention under Rule 24(b)(1)(B) where the applicant shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *Perry*, 587 F.3d at 955 (internal quotation marks and citation omitted). "Where a putative intervenor has met these

requirements, the court may also consider other factors in the exercise of its discretion. *Id.* "These relevant factors include the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case." *Spangler v. Pasadena City Bd. of Ed*., 552 F.2d 1326, 1329 (9th Cir. 1977). The Court may also consider "whether the intervenors' interests are adequately represented by other parties" and "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Id.*

"When making this discretionary determination, a district court 'must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Lucent,* 642 F.3d at 741(quoting Fed. R. Civ. P. 24(b)(3)). "The district court's discretion under Rule 24(b), to grant or deny an application for permissive intervention includes discretion to limit intervention to particular issues." *Id.* (quoting *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181 (9th Cir.1974) (internal quotation marks and ellipses omitted).

Here, the Court finds that the Legislature's motion is timely and that its Proposed Answer reflects defenses that present common issues of fact and law. As the Legislature has met the threshold requirements for permissive intervention, the Court may consider other factors in its discretion, including whether the

Legislature "will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler*, 552 F.2d at 1329.

In its reply brief, the Legislature says it would call witnesses at the preliminary injunction hearing to present evidence of whether "Relevant Abortions"[2] are "occurring in Idaho's Medicare-funded emergency rooms," but the State may not. *Legislature's Reply* at 5, Dkt. 25. While the Court – in light of the evidence it currently has before it – would not consider the State's decision not to call witnesses at the preliminary injunction hearing on this narrow factual question a reason to justify the Legislature's intervention as of right, it nonetheless finds that that justifies the Legislature's permissive intervention *on this sole issue*. *Lucent*, 642 F.3d at 741 (limiting intervention to discrete issues).

The Legislature may therefore permissively intervene, but it will be limited at this juncture to presenting argument and evidence in opposition to the United States' motion for preliminary injunction. More specifically, the Legislature's participation in the preliminary-injunction proceedings will be limited to allowing

[2] The Legislature defines "Relevant Abortions" as "those emergency-room abortions that fall (i) inside the prohibition of abortion found in Idaho Code § 18-622 ("the 622 Statute") and (ii) outside the overlap between the 622 Statute's medical-emergency exception and EMTALA's medical-emergency mandate but still inside EMTALA's mandate." *Legislature's Reply* at 2, Dkt. 25.

it to show "the holes in the 'factual' foundation" of the motion on the issue of "Relevant Abortions," as the Legislature has specifically laid out in its reply. *Legislature's Reply*, 6-7, Dkt. 25 (describing the Legislature's "present litigation plan"). The Court, of course, will allow the Legislature to modify its proposed plan in responding to the preliminary injunction motion on this particular issue as the Legislature sees fit. But the larger point is that, substantively, the Legislature's participation will be limited to allowing it to present evidence and argument aimed at "showing the holes" in the factual foundation of the United States' motion.

Lastly, the Court cannot ignore the issue of whether the Legislature's permissive intervention "will unduly delay or prejudice the adjudication of the original parties' rights." The United States argues that granting the Legislature will prejudice it because it negotiated the briefing schedule with the State under the assumption they would be the only parties in the case – and the "briefing schedule is extraordinarily expedited in light of the impending effective date of the challenged law." *United States' Resp.*, Dkt. 23, at 8. The United States claims that the Legislature's intervention at this juncture would be unfair because "the United States would need to respond to two opposition briefs of up to 20 pages each (plus an unknown number of factual submissions), but would, under the briefing schedule, have only two and a half days (and ten pages) to do so." *Id.*

First, the Court notes that any prejudice to the United States stemming from

the briefing schedule is largely of the United States' own making. It chose to delay filing this case and its motion for preliminary injunction for over six weeks after the Supreme Court issued the *Dobbs* decision. Nonetheless, the Court acknowledges that the Legislature's intervention may cause some prejudice to the United States. To mitigate that prejudice, the Court has limited the Legislature by subject matter, as already explained.

Further, in terms of briefing deadlines, the Court will adopt this schedule:

(1) The Legislature must file its brief on **August 16, 2022** – which is the same day the State's brief is due. If the Legislature intends to present affidavits, any such affidavits shall likewise be due on **August 16, 2022**.

(2) The United States must file its optional combined reply brief – addressing both the State's and the Legislature's briefing – by the existing reply deadline of **12:00 p.m. Mountain Time on August 19, 2022**.

As for page limitations, the State will be permitted 20 pages, and the Legislature 15. The United States will be allowed 20 pages for its combined reply brief.

Finally, in an effort to ensure that the preliminary-injunction proceedings are efficient and streamlined, the Court will not allow the State and the Legislature to pursue duplicative strategies during the preliminary-injunction proceedings. More

specifically, during an informal conference, the State indicated it views the United States' motion as presenting purely legal questions. The Legislature, on the other hand, says it is "prepared to present evidence countering the Government's position on the material issues of fact." *Legislature Reply Br.* Dkt. 25, at 5. Accordingly, to the extent that the Legislature intends to present factual evidence (or challenge the United States' factual submissions) – including by calling witnesses – the Court will not allow the State to duplicate those efforts.

ORDER

IT IS ORDERED that the Idaho Legislature's Motion to Intervene (Dkt. 15) is **GRANTED in part and DENIED in part**, as explained above.

DATED: August 13, 2022

B. Lynn Winmill
U.S. District Court Judge

No. 23-35153

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF IDAHO,

Defendant,

and

THE SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, MIKE MOYLE; IDAHO STATE SENATE PRESIDENT PRO TEMPORE, CHUCK WINDER; AND THE SIXTY-SEVENTH IDAHO LEGISLATURE

Defendants-Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
No. 1:22-cv-00329-BLW • Hon. B. Lynn Winmill

APPELLANT'S EXCERPTS OF RECORD VOLUME 2 of 3

Daniel W. Bower, ISB #7204
Morris Bower & Haws PLLC
1305 12th Avenue Road
Nampa, Idaho 83686
Telephone: 208-345-3333
dbower@morrisbowerhaws.com

Monte Neil Stewart, ISB #8129
11000 Cherwell Court
Las Vegas, Nevada 89144
Telephone: 208-514-6360
monteneilstewart@gmail.com

Attorneys for Defendants-Intervenors-Appellants
THE SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, MIKE MOYLE; IDAHO STATE SENATE PRESIDENT PRO TEMPORE, CHUCK WINDER; AND THE SIXTY-SEVENTH IDAHO LEGISLATURE

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant, and SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE, Intervenor-Defendants.	Case No. 1:22-cv-329-BLW

IDAHO LEGISLATURE'S REPLY IN SUPPORT OF RENEWED MOTION TO INTERVENE [DKT. 105]

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

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The Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature ("Legislature") respectfully submit this reply brief in support of its Renewed Motion to Intervene (Dkt. 105) ("Legislature's Motion") and in response to the United States' Opposition to the Idaho Legislature's Renewed Motion to Intervene (Dkt. 109) ("Opposition" or "Op.").

INTRODUCTION

The United States dislikes Berger v. North Carolina State Conference of the NAACP, 142 S. Ct. 2191 (2022). Reciting losing arguments from that decision—including arguments urged by the sole dissenting Justice—the government contends that the Legislature does not satisfy the criteria for intervention as of right under Rule 24(a)(2).

But excluding the Legislature as a full party in this case defies Berger. There, an eight-member majority of the Supreme Court held that "federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." 142 S. Ct. at 2201. Applying that straightforward rule, the Court concluded North Carolina lawmakers were not adequately represented by the state attorney general when a state law expressly authorized them to intervene in litigation challenging state law, regardless of the attorney general's participation. *Id*. at 2206. Here, Idaho Code § 67-465 authorizes the Legislature to intervene in federal litigation to defend Idaho law. Following Berger means granting the Legislature's Renewed Motion to Intervene.

Even if express authorization under Idaho law does not justify intervention by itself, the Motion identifies ample reasons to conclude that the Attorney General's Office (AGO) does not adequately represent the Legislature. Since this Court evaluated the Legislature's initial motion to

intervene more than two months ago, substantial differences have unfolded separating the Legislature's litigating posture from the AGO's. They disagree about the appropriate tempo of motion practice, the proper legal arguments to raise, and which legal positions to prioritize. In all these ways, the Legislature "seek[s] to give voice to a different perspective" from the AGO. *Id*. at 2205.

The Supreme Court has said that "Rule 24(a)(2) promises intervention to those who bear an interest that may be practically impaired or impeded 'unless existing parties adequately represent that interest.'" Berger, 142 S. Ct. at 2203 (quoting Fed. R. Civ. P. 24(a)(2)). The Legislature's Motion amply satisfies that standard—either because Idaho law expressly authorizes the Legislature to intervene in cases like this or because substantial differences in litigation approach establish that the AGO does not adequately represent the Legislature in fact. Either reason justifies intervention as of right. The Legislature's Motion should be granted.

ARGUMENT

I. Under Berger, the Idaho Legislature Should be Allowed to Intervene As of Right.

The United States argues that this case is "materially distinguishable" from the Supreme Court's decision in Berger. Op. at 3. Even a cursory reading of Berger says otherwise, as a comparison of the Opposition with Berger shows:

- The United States insists that the Legislature has no right to intervene "because [it] and the State of Idaho maintain identical interests in pursuing the same objective in this lawsuit." Op. at 1. Berger says that Rule 24(a)(2) "promises intervention to those who bear an interest that may be practically impaired or impeded 'unless existing parties adequately represent that interest'"—a standard requiring "only a minimal challenge." 142 S. Ct. at 2203.

- The United States argues that intervention is unnecessary because "the Legislature and the State of Idaho maintain identical interests in pursuing the same objective in this lawsuit." Op. at 1. Justice Sotomayor said much the same, when dissenting in Berger. 142 S. Ct. at 2206 (Sotomayor, J., dissenting) (criticizing the majority for allowing intervention "even where the interests that the intervenors seek to represent are

identical to those of the existing party"). Repudiating that logic is the majority's central holding: "[A] presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." 142 S. Ct. at 2204. In fact, the Court stressed that "[f]or a federal court to presume a full overlap of interests when state law more nearly presumes the opposite would make little sense and do much violence to our system of cooperative federalism. *Id*.

- Likewise, the United States argues that "[a]ny interest that the Legislature has in this case is indistinguishable from the interest of the State of Idaho, of which it is a part." Op. at 4. By contrast, Berger cautions that "federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." 142 S. Ct. at 2201.

- The United States insists that "no law enacted by Idaho can override the requirements of the Federal Rules of Civil Procedure" and that "Idaho Code § 67-465 does not provide a basis for the Legislature to participate as a separate entity from the State where the State, represented by the Attorney General, is forcefully defending the constitutionality of a state law." Op. at 5. Justice Sotomayor registered similar criticism. 142 S. Ct. at 2214 (Sotomayor, J., dissenting). But the question in Berger—and here—is whether Rule 24(a)(2)'s requirement of adequate representation is satisfied when a state authorizes more than one state body to defend the validity of state law in federal court. Under Berger, "a federal court must respect that kind of sovereign choice, not assemble presumptions against it." *Id*. at 2206.

In short, the United States opposes intervention for reasons that Berger rejects. Accepting the government's position would produce a decision at odds with Berger.

Not content with disputing Supreme Court precedent, the United States points to accidental or irrelevant facts from Berger in a strained attempt to distinguish it.

Berger did not turn on the fact that "the North Carolina legislature had no way, absent intervention, to ensure that the challenged law was adequately defended in court." Op. at 3. Justice Gorsuch, writing for the Court, articulated a broader principle: "federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." Berger, 142 S. Ct. at 2201. That principle applies here, since the Idaho Legislature is expressly authorized to intervene in litigation challenging the validity of state law. Idaho Code § 67-465.

Nor does Berger remotely suggest that intervention is warranted only to avoid "allowing a private plaintiff to pick its preferred defendants." *Id*. at 4 (quoting Berger, 142 S. Ct. at 2203). Berger explained that preventing plaintiffs from trying to "control which state agents they will face across the aisle" is only one reason not to exclude a state's "duly authorized representatives" as intervenors. 142 S. Ct. at 2201. Besides that, it is uncertain whether the United States opposes the Legislature's intervention here, precisely to avoid "a full and fair adversarial testing of the State's interests and arguments." *Id*.

Equally irrelevant are the facts that Idaho law "does not expressly authorize the Legislature to represent the State" and does not make the Legislature a necessary party. Op. at 5. Idaho Code § 67-465 says with absolute clarity that when a lawsuit challenges "the constitutionality of an Idaho statute … either or both houses of the legislature may intervene in the action as a matter of right." Idaho Code § 67-465. Under Berger, that grant of authority supports intervention as of right. 142 S. Ct. at 2206 (because state law authorizes intervention by legislative leaders, "a federal court must respect that kind of sovereign choice, not assemble presumptions against it"). As in Berger, "a full consideration of the State's practical interests may require the involvement of different voices with different perspectives." 142 S. Ct. at 2203.

Since Idaho Code § 67-465 expressly authorizes the Legislature to intervene in litigation challenging the validity of state law, this Court should respect that "sovereign choice" by granting the Legislature's Motion. *Id*. at 2206.

II. Differences in Legal Tactics Can Establish Inadequate Representation.

The United States errs as well by contending that "minor differences in litigation strategy" do not justify intervention. Op. at 6. Since the Legislature and the AGO share the nominal aim of defending section 18-622, the United States says that "the Legislature must make a compelling

showing that the Attorney General is not adequately representing its interests for intervention to be appropriate." *Id*.

Fabricating a heightened standard for intervention is baseless. It parallels Justice Sotomayor's solo dissent in Berger—not the reasoning of the eight-member majority. She alone disparaged clashing litigation priorities as "a disagreement over trial strategy" or "a choice about litigation strategy." Berger, 142 S. Ct. at 2212 (Sotomayor, J., dissenting). Only she took the view that differing approaches to litigation tempo and legal priorities catalogued by the majority "do[ ] not render state respondents' representation inadequate." *Id*. at 2213. For the Court, however, it mattered that the state Attorney General did not submit expert witness affidavits or seek a stay following an injunction, just as it mattered that his litigating stance was influenced by factors other than a single-minded defense of state law. *Id*. at 2205. All these demonstrated that representation was inadequate.

Berger directly refutes the notion that "mere differences in litigation strategy … do not rise to the level of inadequacy of representation that justif[ies] [sic] intervention as of right." Op. at 1. They certainly can—and such differences satisfy Rule 24(a)(2) here.

III. Differences in Litigation Strategy Separating the Legislature and the AGO Demonstrate that the Latter Does Not Adequately Represent the Former.

A. The Legislature is trying to undo the preliminary injunction with an urgency that the AGO does not share.

The United States insists that differences in litigation stance between the Legislature and the AGO amount to "minor disagreements on timing and strategy." Op. at 8. We disagree. The procedural and substantive disparities in approach catalogued in the Legislature's Motion show that the AGO cannot represent the Legislature's interests adequately.

Begin with the delays in acting on the Legislature's Motion for Reconsideration. The AGO's chosen briefing schedule and its concessions to the government (Dkt. 100) have put off a

decision on the Legislature's Motion for months. The United States says that these delays are irrelevant "because [Idaho Code § 18-622] was enjoined before it ever went into effect." *Id*. We strenuously disagree. Enjoining its abortion statute irreparably harms the State of Idaho and its people.[1] *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); accord *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (granting a stay).

Another procedural gap separating the Legislature from the AGO is its response to the Legislature's Motion for Reconsideration and Renewed Motion to Intervene. In each instance, the AGO responded with terse statements expressing its non-opposition (Dkt. 104, 110). Failure to support the Legislature in these critical motions exemplifies the gulf dividing the Legislature's litigation posture from the AGO's.

B. The Legislature is pressing and prioritizing different legal arguments in defense of Idaho Code § 18-622 than the AGO.

The United States does not dispute that the AGO "answered the Court's questions differently" than counsel for the Legislature during the hearing on the preliminary injunction. Op. at 9. Nor does the government dispute that the AGO "declined to make, or make more fully, some of the Legislature's preferred legal arguments." *Id*. All the government can say is that these disparities "do[ ] not establish a divergence of interests" under Rule 24(a)(2). *Id*. Nonsense. Berger found inadequacy of representation based on the failure to submit expert witness affidavits and

[1] Although the United States criticizes the Legislature for not seeking an expedited briefing schedule following its Motion for Reconsideration, Op. at 8, that decision should not be misunderstood to suggest a lack of urgency. The Legislature registered its opposition to delays occasioned by both the AGO and the United States. Rushing to enjoin Idaho Code § 18-622 and then throttling back to a leisurely pace when determining whether the injunction is erroneous (as we maintain) is profoundly unfair to the people of Idaho. But a motion to expedite was ultimately decided against given a perceived low likelihood of success.

seek a stay following an injunction, as well as the cross-cutting factors drawing the state attorney general away from a single-minded focus on defending state law. 142 S. Ct. at 2205. Compared with these, the differences between litigating positions limned in the Legislature's Motion are even starker. The Legislature's interests are not adequately represented by the AGO.

A word on the major questions doctrine. The United States says that it "applies only to courts reviewing the actions of administrative agencies and does not apply here." Op. at 9 (citing *West Va. v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022)). That's incorrect. A fulsome explanation of the doctrine and its proper application appear in the Legislature's Reply Brief supporting its Motion for Reconsideration. Dkt. 111, at 6–7. To put it succinctly, what unites decisions under the major questions doctrine is a concern with the exercise of "highly consequential" executive power "beyond what Congress could reasonably be understood to have granted." *West Va. v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022). Nowhere do the pertinent decisions exclude the doctrine based on whether the challenged assertion of executive power originates with an administrative agency or some other component of the Executive Branch. Cases under the major questions doctrine "have arisen from all corners of the administrative state." *Id*. at 2608. Even if the source of executive assertion mattered, the Department of Justice is a federal agency authorized to administer federal law, and the interpretation of EMTALA at the foundation of this case first appeared in guidance issued by the U.S. Department of Health and Human Services. Dkt. 111, at 7.

For its part, the Legislature sees the major questions doctrine as a fatal flaw undermining the government's assertion that EMTALA preempts Idaho law. But where the Legislature puts a high priority on that argument, see Dkt. 97-1, at 10–11, the AGO reduces it to a footnote. Dkt. 101-1, at 3 n.1. And even though the footnote incorporates the Legislature's argument, the widely

differing priority given to what could be a conclusive objection to the United States' case illustrates again why the AGO does not represent the Legislature's interests adequately.

Finally, the "risk of turning this case into the 'nine-headed Hydra' the Court feared in its prior order" is no reason to deny intervention. Op. at 9. Rule 24(a)(2) authorizes intervention as of right when a movant shows that its interests are inadequately represented by existing parties. The Legislature has done that. An extratextual concern with administrative convenience is no reason to deny intervention. A party opposing intervention raised that very issue in Berger, and the Court brushed it aside. "Whatever additional burdens adding the legislative leaders to this case may pose, those burdens fall well within the bounds of everyday case management." 142 S. Ct. at 2206. So too, here.

CONCLUSION

For these reasons, the Legislature respectfully asks this Court to grant its Renewed Motion to Intervene.

Dated this 27th day of October, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2022, 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

Brian V Church
Clay R. Smith
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Alan Wayne Foutz
Office of the Attorney General
brian.church@ag.idaho.gov
crsmith73@outlook.com
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov
alan.foutz@ag.idaho.gov

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, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, 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
Indiana, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming, Nebraska

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

/s/ Daniel W. Bower
Daniel W. Bower

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant, and SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE, Intervenor-Defendants.	Case No. 1:22-cv-329-BLW

IDAHO LEGISLATURE'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION [DKT. 97]

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

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The Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (Legislature) respectfully submit this reply brief in support of its Motion for Reconsideration of Order Granting Preliminary Injunction [Dkt. 97] (Legislature's Motion) and in response to the United States' Consolidated Opposition to the State of Idaho's and the [Idaho] Legislature's Motions for Reconsideration [Dkt. 106].

INTRODUCTION

"It is common for both trial and appellate courts to reconsider and change positions when they conclude that they made a mistake. This is routine in judging, and there is nothing odd or improper about it." *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013). The United States evidently sees things differently. Its opposition to the Legislature's Motion is premised on the false notion that amending, altering, or vacating a decision with clear legal errors is somehow a rare event. It is not.

The United States offers no good reason to deny the Motion. Rule 59(e) authorizes a district court to reconsider a preliminary injunction that rests on clear error, which is all that the Legislature has asked. Discretionary limits placed by this Court on the scope of the Legislature's intervention emphatically do not prevent the Court from granting the Legislature's Motion. Because it rests on multiple clear errors, the preliminary injunction should be vacated.

ARGUMENT

I. The United States Misstates the Controlling Standard Under Rule 59(e).

In its opposition, the government contends that on a motion for reconsideration, "the moving party must clear a high bar." Op. at 3. Conceding that reconsideration may be granted "to correct manifest errors of law or fact," the government insists that such errors only reach "an

obvious error requiring immediate correction." *Id.* at 3, 4 (citations omitted). The Legislature's Motion describes several errors meeting that standard.

But in delineating what counts as clear error, the United States contradicts itself. On one hand, it says that the Motions for Reconsideration should be denied because the Legislature and the State add nothing to the arguments presented before the injunction was issued. *Id.* at 3–4. Yet the Ninth Circuit has said that a Rule 59(e) motion may be granted "even if it raises no new grounds." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984). On the other hand, the government criticizes the Legislature's "efforts to marshal wholly new arguments" as "likewise inappropriate." *Id.* at 4. By the government's account, reconsideration is misplaced whether the moving party asserts old arguments or new.

But that account is false. Nothing in Rule 59(e) justifies a heads-I-win, tails-you-lose approach. Reconsideration is proper when a moving party identifies "clear error" in the challenged order. *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Reconsideration serves the interests not only of the moving party but of the judicial system. "Errors in the trial court may be most speedily corrected by the trial judge. Frequently a trial judge has had to rule on difficult questions under time pressures and without thorough briefing by the parties. A motion for reconsideration may, in some instances, avoid the necessity of an appeal." *United States v. Walker*, 601 F.2d 1051, 1058 (9th Cir. 1979). Since the Legislature's Motion serves these purposes, it should be granted.

Additionally, the United States quibbles that the Legislature's Motion signals "disagree[ment] with the Court's decision—not that the Court made an obvious error requiring immediate correction." Op. at 4. Not so. The Legislature's Motion identifies clear errors of law calling for reconsideration. Nor is there any question that reconsideration is the apt procedural

vehicle for correcting a mistaken preliminary injunction. *See, e.g*, *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989).

Determining whether to grant the Legislature's Motion thus turns on whether it identifies flaws in the preliminary injunction that rise to the level of *clear error*. "Clear error occurs when 'the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.'" *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Legislature has met that standard, as we explain below.

II. Limits Placed by This Court on the Legislature's Intervention Do Not Prevent Granting the Legislature's Motion.

The United States asks the Court to "disregard the Legislature's legal arguments as improper." Op. at 5. Why? Because, in the government's view, the Legislature's Motion represents "an unapproved expansion of the Legislature's limited role in this case." *Id.* at 6. But denying the Legislature's Motion because of the Legislature's status as Intervenor-Defendant is neither necessary nor logical.

Although the Legislature's permissive intervention is constrained, the United States misinterprets those limitations as a bar on considering the Legislature's meritorious legal arguments. *Id.* at 5. Those limitations are within this Court's discretion—and that discretion may (and we think should) be exercised to lift them. The Court itself invited the Legislature to renew its motion to intervene as of right if "the State can no longer adequately represent the Legislature's interests." Dkt. 27, at 2. Events since then amply satisfy that condition. A renewed motion to intervene (Dkt. 105) detailing why the Attorney General cannot adequately represent the Legislature is now pending. That motion is firmly supported by Fed. R. Civ. P. 24(a)(2) and the

Supreme Court's decision in *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022).

Nor does the United States get any mileage out of the Court's ruling denying the Legislature's motion to submit legal arguments (Dkt. 75). Opp. at 5–6. That ruling came two months ago, when the disparities between the Legislature's and State's litigating postures were less obvious. Not only that, a chief reason for excluding the Legislature's arguments is obsolete. The Court worried then that "[a]llowing the Legislature to file an additional brief past the deadline of the expedited briefing schedule would unduly prejudice the United States …." (Dkt. 75). Tight briefing schedules certainly pose no worry now. Abandoning its breakneck speed before a preliminary injunction issued, the United States not only took all the time allotted under the rules for responding to the Legislature's Motion, it sought and obtained an extension besides (Dkt. 102).

Even more fundamentally, limits on the Legislature's permissive intervention do not diminish the Court's authority. It makes no sense to turn a blind eye to the Legislature's well-placed legal arguments merely because the Legislature submitted its motions for reconsideration and intervention in tandem, rather than appealing the preliminary injunction beforehand. Legal errors infecting the preliminary injunction order will not look better on appellate review. *Walker*, 601 F.2d at 1058. Reconsidering the preliminary injunction in light of the substantial legal arguments asserted in the Legislature's Motion is entirely consistent with Rule 59(e).

III. Clear Errors of Law Warrant Reconsideration of the Preliminary Injunction.

A. *Looking beyond these fabricated obstacles, the United States contests the errors in the Legislature's Motion. Most of those arguments merit only a brief response.*

1. The United States lacks a cause of action under the Supremacy Clause. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015). It makes no difference whether the

government couches its claim as one in equity. The Supremacy Clause is "silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Id.*

2. The United States misreads EMTALA as an abortion mandate, when the statute requires a hospital to extend necessary medical treatment to both a mother *and* her unborn child. 42 U.S.C. § 1395dd(c)(2)(A). Determining when the Legislature first raised this argument is immaterial. Interpreting EMTALA to mandate abortion under an undefined range of emergency circumstances is the kind of "clear error" for which reconsideration is appropriate. *Sch. Dist. No. 1J, Multnomah Cnty.*, 5 F.3d at 1263. The United States does not persuasively show that courts long understood EMTALA as a nationwide abortion mandate before the Administration responded to *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). To accept that construction now distorts EMTALA when read as a whole.

3. The United States also misrepresents Idaho Code § 18-622. Its affirmative defenses are "defense[s] to *prosecution*." Idaho Code § 18-622 (emphasis added). A physician entitled to such a defense does not face "indictment, arrest, pretrial detention, and trial for every abortion they perform"—and saying so is clear error. Dkt. 95, at 20. The government misstates Idaho law by endorsing that misinterpretation as "grounded in statutory text, settled legal principles, and common sense." Op. at 16–17.

4. The United States cannot convincingly explain why invoking EMTALA to preempt Idaho Code § 18-622 is not clear error. EMTALA "do[es] not preempt any State or local law requirement" unless it "directly conflicts" with that statute. 42 U.S.C. § 1395dd(f). What's more, 42 U.S.C. § 1395 prohibits "any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided"—a prohibition that applies to the application of EMTALA. Contrary to the preliminary injunction

order, these provisions strongly counsel against preemption. Dkt. 95, at 18–26. The United States cannot justify its preemption claim by recasting § 1395 as a provision aimed at deferring to "medical professionals' judgment," Op. at 15 n.6, when the statute is aimed at withholding federal authority over "the practice of medicine." 42 U.S.C. § 1395. It makes no difference when the Legislature raised § 1395. Op. at 15 n.6. The point of a timely motion under Rule 59(e) is to correct clear errors brought to the Court's attention.

B. The United States stumbles as well in attempting to explain away the Legislature's constitutional objections to the preliminary injunction order.

1. The major questions doctrine is anything but "irrelevant." Op. at 19.

The United States is wrong that the doctrine applies only "where there is affirmative *agency* regulatory action." *Id.* Decisions invoking it "have arisen from all corners of the administrative state." *West Va. v. EPA*, 142 S. Ct. 2587, 2608 (2022). In each instance, the Supreme Court invalidated executive action for resting on an "asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 2609. So too, here.

As in those cases, the United States here points to "a colorable textual basis" for its reading of EMTALA. *Id.* But that is hardly enough to justify the previously "unheralded power" to commandeer medical facilities into performing abortions or to override state laws to the contrary. *Id.* at 2610 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). Instead, the United States must demonstrate that EMTALA contains "clear congressional authorization" for this unprecedented and politically controversial exercise of federal power. *Id.* And that the United States does not do.

EPA nowhere limits the major questions doctrine to the statutory constructions of a federal agency. Far from it. Fundamental concerns with the lawful exercise of executive power—whatever the source—unite decisions under that doctrine.

Even if the major questions doctrine did require federal agency action, it exists here. The United States' interpretation of EMTALA as a nationwide abortion mandate, along with the government's conception of the statute's preemptive force, originated with "clarifying guidance" issued by the U.S. Department of Health and Human Services. https://www.hhs.gov/about/news/2022/07/11/following-president-bidens-executive-order-protect-access-reproductive-health-care-hhs-announces-guidance-clarify-that-emergency-medical-care-includes-abortion-services.html. HHS released that guidance in response to an executive order issued in the immediate wake of *Dobbs*. Exec. Order 14076, 87 Fed. Reg. 42053, 42053 (July 13, 2022). Besides, the U.S. Department of Justice is an executive agency. The major questions doctrine is not only relevant; it's controlling.

2. The United States trivializes the Legislature's Article III argument. The question is not whether the Supremacy Clause requires states to comply with federal law, but whether the government's novel interpretation of EMTALA as an abortion mandate illicitly frustrates the Supreme Court's decision to "return that authority [to regulate abortion] to the people and their elected representatives." *Dobbs*, 42 S. Ct. at 2284. Crediting the government's reading of EMTALA puts the preliminary injunction order in direct conflict with *Dobbs*. And that conflict is another instance of clear error.

3. Spending Clause objections are no less salient. The United States insists that its lawsuit "is simply seeking to affirm that the existing provisions of the Medicare statute persist in the face of a new conflicting state law." Op. at 22. But the government fails to show that EMTALA has always required Medicare-funded emergency facilities to perform abortions in response to an unspecified range of emergency conditions. Without a long-standing judicial consensus, the United

States' interpretation of EMTALA operates as a novel coercive measure that violates the Spending Clause. Dkt. 97-1, at 14–15.

4. Finally, the United States denies that the preliminary injunction contains clear error under the Tenth Amendment. Op. at 22–23. But the government's references to Commerce Clause decisions are beside the point. No one contests that Congress's valid exercise of enumerated powers may affect a state's reserved powers. Here, however, the United States' expansive reading of EMTALA prevents Idaho from exercising regulatory powers over abortion that historically belonged within the scope of its police power and that *Dobbs* self-consciously returned to the states. That consequence presents the live issue whether the preliminary injunction deprives the State of Idaho of its reserved powers, contrary to the Tenth Amendment. *Bond v. United States*, 564 U.S. 211, 221 (2011) ("The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.").

CONCLUSION

For these reasons, the Legislature respectfully asks this Court to grant its Motion for Reconsideration.

Dated this 26th day of October, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2022, 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

Brian V Church
Clay R. Smith
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Alan Wayne Foutz
Office of the Attorney General
brian.church@ag.idaho.gov
crsmith73@outlook.com
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov
alan.foutz@ag.idaho.gov

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, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, 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 Indiana, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming, Nebraska

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

/s/ Daniel W. Bower
Daniel W. Bower

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief, Civil Litigation Division

MEGAN A. LARRONDO, ISB #10597
BRIAN V. CHURCH, ISB #9391
ALAN W. FOUTZ, ISB #11533
INGRID C. BATEY, ISB #10022
Deputy Attorneys General
CLAY R. SMITH, ISB #6385
Special Deputy Attorney General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
brian.church@ag.idaho.gov

JOAN E. CALLAHAN, ISB #9241
NAYLOR & HALES, P.C.
Special Deputy Attorney General
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Telephone: (208) 383-9511
Facsimile: (208) 383-9516
joan@naylorhales.com

Attorneys for Defendant State of Idaho

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329 **STATE OF IDAHO'S RESPONSE TO IDAHO LEGISLATURE'S RENEWED MOTION TO INTERVENE (Dkt. 105)**

The State takes no position on whether the Court should grant the Legislature's motion to intervene. The State will continue to vigorously defend Idaho's abortion law in this case, and it stands by its position and arguments in this matter.

/ / /

/ / /

DATED this 20th day of October, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Steven L. Olsen
STEVEN L. OLSEN
MEGAN A. LARRONDO
BRIAN V. CHURCH
Deputy Attorneys General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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

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

Attorney for Amici States California, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota,

DANIEL W. BOWER
Morris Bower & Haws PLLC
dbower@morrisbowerhaws.com

MONTE NEIL STEWART
Attorney at Law
monteneilstewart@gmail.com

Attorneys for Intervenors-Defendants

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

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

JACOB M. ROTH
Jones Day
jroth@jonesday.com

AMANDA K. RICE
Jones Day
arice@jonesday.com

CHARLOTTE H. TAYLOR
Jones Day

Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Washington, D.C.

ctaylor@jonesday.com

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

SHANNON ROSE SELDEN
Debevoise & Plimpton LLP
srselden@debevoise.com

ADAM B. AUKLAND-PECK
Debevoise & Plimpton LLP
Aaukland-peck@debevoise.com

LEAH S. MARTIN
Debevoise & Plimpton LLP
lmartin@debevoise.com

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

/s/ Steven L. Olsen
STEVEN L. OLSEN
Deputy Attorney General

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
BRIAN D. NETTER
Deputy Assistant Attorney General
ALEXANDER K. HAAS
Director, Federal Programs Branch
DANIEL SCHWEI
Special Counsel
ANNA DEFFEBACH (DC Bar # 241346)
LISA NEWMAN
EMILY NESTLER
CHRISTOPHER A. EISWERTH
Trial Attorneys
JULIE STRAUS HARRIS
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 993-5182
anna.l.deffebach@usdoj.gov

Counsel for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329-BLW **UNITED STATES' OPPOSITION TO THE IDAHO LEGISLATURE'S RENEWED MOTION TO INTERVENE [Dkt. 105]**

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INTRODUCTION

As explained in the United States' opposition to the Legislature's first motion to intervene, Rule 24(a) permits intervention as a matter of right "when an applicant: (i) timely moves to intervene; (ii) has a significantly protectable interest related to the subject of the action; (iii) may have that interest impaired by the disposition of the action; and (iv) will not be adequately represented by existing parties." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) (citing Fed. R. Civ. P. 24(a)(2)). "Failure to satisfy any one of the requirements is fatal to the application[.]" *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). An applicant seeking intervention bears the burden of proving that these requirements are met. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). The Legislature's renewed motion to intervene as of right fails for the same reason as its initial intervention motion: its interest in this litigation is not distinct from the interest of the State of Idaho, of which it is a part, and that interest is adequately represented by the State of Idaho in this litigation. The Legislature has not demonstrated that its interest has diverged from the State of Idaho in the course of this litigation. The mere differences in litigation strategy that the Legislature describes here do not rise to the level of inadequacy of representation that justify intervention as of right because the Legislature and the State of Idaho maintain identical interests in pursuing the same objective in this lawsuit. This case involves straightforward questions of statutory interpretation regarding the meaning of EMTALA, the meaning of Idaho Code § 18-622 (the Total Abortion Ban), and whether those two statutes conflict. The Legislature's full participation as a party would not materially aid the Court's straightforward statutory analysis. The Legislature's renewed motion to intervene as of right should accordingly be denied.

BACKGROUND

The Idaho Legislature, represented by private retained counsel, filed a motion to intervene in this lawsuit on August 8, 2022. Dkt. 15. In its intervention motion and supporting reply brief, the

Legislature explained that it intended to present evidence on a narrow factual question—whether "Relevant Abortions" were occurring in the state of Idaho—on which the State, represented by the Attorney General, did not intend to present evidence. Dkt. 15-1; Dkt 25. In light of the narrow factual question that the Legislature promised to address, the Court granted the Legislature's motion for permissive intervention "*on this sole issue,*" Dkt. 27 at 17, and ordered the Legislature to file its brief on the same day as the State on August 16. The Legislature filed its motion papers on August 16 and filed several declarations on August 17. Dkt. 71.

Also on August 17, the Legislature filed a motion for leave to file legal arguments, which included a brief containing legal arguments that far exceeded the scope of the Court's order granting the Legislature permissive intervention. Dkt. 69. The Court "decline[d] at this juncture to modify the conditions it imposed in its earlier order allowing the Legislature to permissively intervene" and rejected the Legislature's motion. Dkt. 75. On August 22, the Court held a hearing, at which the Legislature was permitted to present oral argument. The Legislature did not limit its argument to the narrow factual question on which its intervention was premised. *See, e.g,* Hr'g Tr. at 54-65 (raising arguments about previously unmentioned provisions of EMTALA); *see id.* at 62-64 (raising arguments about scope of proposed order). The Court issued its opinion and order granting the United States' motion for a preliminary injunction on August 24. Dkt. 95.

On September 7, the Legislature moved for reconsideration of the Court's preliminary injunction order. Dkt. 97. Notwithstanding the Court's order limiting the scope of intervention, the Legislature's motion did not address the factual issues identified in the Court's intervention order but rather focused exclusively on legal argument. Dkt. 97-1. On September 21, the State also moved for reconsideration of the Court's preliminary injunction order (Dkt. 101), raising many of the same legal arguments as were raised in the Legislature's motion. *Compare* Dkt. 101-1 at 14-17, 19 (arguing the United States lacks a cause of action); *with* Dkt. 97-1 at 11 (same). Now, the Legislature asks this Court

to reconsider its prior order granting the Legislature permissive intervention on a narrow factual issue and seeks to expand its role in this case to an unlimited intervention as of right. The Legislature's renewed motion should be denied.

ARGUMENT

I. The Court Properly Denied the Legislature's Motion to Intervene as of Right

A. *Berger v. North Carolina State Conference of the NAACP* Does Not Compel a Different Result

As this Court correctly recognized in its prior order denying the Legislature's motion for intervention as of right under Rule 24(a), the circumstances of this case are materially distinguishable from *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2205 (2022). In *Berger*, the NAACP sued select government officials including the governor and the State Board of Elections, who agreed with its position that North Carolina's recently enacted voter identification law (which the governor had vetoed) was unconstitutional. The governor and the State Board of Elections were represented by the North Carolina Attorney General, who (while serving as a state senator) had voted against an earlier version of the voter identification law and had filed a declaration in support of a legal challenge to the law. *Id.* at 2198. In fact, the governor, after he was dismissed from the case as a defendant, filed an amicus brief siding with the NAACP and arguing that the challenged statute was unconstitutional. *Id.* at 2200. The North Carolina legislature sought to intervene as a party in the lawsuit to provide a robust defense of the challenged law, which neither the Attorney General nor the named state officials were willing to provide. *Id.* at 2198-99. Because the select officials that the NAACP sued under the *Ex Parte Young* doctrine did not intend to defend the state law, the North Carolina legislature had no way, absent intervention, to ensure that the challenged law was adequately defended in court. *Id.*; *see also Karcher v. May*, 484 U.S. 72, 80 (1987) ("The Legislature was permitted to intervene because it was responsible for enacting the statute and because no other party defendant was willing to defend the statute.").

Here, by contrast, the United States sued the State of Idaho as a whole, including all of its components and agencies, and there is little chance that the choice of defendants by the United States will result in "a hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Berger*, 142 S. Ct. at 2201. As this Court previously ruled, "the practical concerns animating *Berger* do not exist here: there is no risk the United States has 'select[ed] as their defendants those individual officials [it] consider[s] most sympathetic to its cause or most inclined to settle favorably and quickly.'" Dkt. 27 at 13 (quoting *Berger*, 142. S. Ct. at 2201). This is not a case where a private plaintiff has attempted to "pick its preferred defendants and potentially silence those whom the State deems essential to a fair understanding of its interests." *Berger*,142 S. Ct. at 2203. For those reasons, *Berger* is distinguishable here.

There is no need for the Legislature to intervene as a party under Idaho Code § 67-465 because the Legislature, as part of the State of Idaho, is already a party to this lawsuit. Like the rest of Idaho's "departments, agencies, offices, officers, boards, commissions, institutions and other state entities," the Legislature is represented by the Attorney General in court. Idaho Code § 67-1401(1). *See also* Dkt. 27 at 13 ("the Legislature has presented no credible argument that it itself is distinct from 'the state,' either formally or functionally for purposes . . . under Rule 24(a)."). And the State of Idaho, including the Governor and the Attorney General, have expressed strong support for the Total Abortion Ban and have defended it at every opportunity, including via litigation of this case. This is not, as the Legislature claims, a case in which a "State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law[,]" because the State as a whole is a party to the lawsuit and its duly authorized representatives are already defending its interests. *Berger*, 142 S. Ct. at 2201. Any interest that the Legislature has in this case is indistinguishable from the interest of the State of Idaho, of which it is a part.

Moreover, no law enacted by Idaho can override the requirements of the Federal Rules of

Civil Procedure that parties asserting a right of intervention under Rule 24(a) must possess an interest in the litigation that is not adequately represented by the existing parties. As this Court has made clear, Rule 24 requires the Legislature to show "that it brings a distinct state interest to bear on this litigation that the State cannot adequately represent." Dkt. 27 at 12. Even if Idaho Code § 67-465 may provide a basis for the Legislature to intervene in cases where neither the State nor the Legislature is already a party to ensure that the State has an opportunity to defend its laws, Idaho Code § 67-465 does not provide a basis for the Legislature to participate as a separate entity from the State where the State, represented by the Attorney General, is forcefully defending the constitutionality of a state law. And unlike statutes enacted by some other states, Idaho Code § 67-465 does not expressly authorize the Legislature to represent the State or litigate on the State's behalf. *See*, *e.g.*, *Berger* 142 S. Ct. at 2202 (citing examples where "'state law may provide for other officials,' besides an attorney general, 'to *speak for the State* in federal court'" or authorize other officials "under state law to *represent the State's interests*' in federal court [and] defend state laws there as parties") (emphasis added) (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1951, 1952 (2019) and *Karcher*, 484 U.S. at 81-82). Nor does Idaho Code § 67-465 provide that the Legislature is a "'necessary part[y]' to suits like this one." *Berger*, 142 S. Ct. at 2202.

The Legislature already is represented, like all other offices and instrumentalities of the State of Idaho, by the Attorney General's office. The Legislature's interest in this lawsuit is encompassed within the State of Idaho's interest, and the Legislature has no unique interest that should allow it a greater role as of right in this litigation.

B. The Legislature's Interest Remains Adequately Represented by the State

The Legislature claims its interests have diverged from the interests of the State of Idaho, such that its interest is no longer adequately represented by the State's counsel in the Attorney General's office. Dkt. 105-1. But that argument is belied by what has transpired since the Court's prior order

denying intervention as of right. Since then, the State of Idaho and the Idaho Legislature have defended the constitutionality of the Total Abortion Ban, making many of the same legal arguments in its defense. The divergence in interests that the Legislature now cites are "merely differences in strategy, which are not enough to justify intervention as a matter of right." *United States v. City of Los Angeles*, 288 F.3d 391, 402–03 (9th Cir. 2002). "[A] proposed intervenor must make a compelling showing of inadequate representation when her interest is identical to that of an existing party." *Callahan v. Brookdale Senior Living Communities, Inc.*, 42 F.4th 1013, 1021 n.5 (9th Cir. 2022) (discussing continued vitality of Ninth Circuit rule after *Berger*). Moreover, "[t]here is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *see also* 7C Charles Allen Wright et al., Fed. Prac. & Proc. Civ. § 1909 (3d ed. April 2022 update). Because both the Legislature and the State of Idaho have an identical interest in this lawsuit—defending the constitutionality of the Total Abortion Ban—the Legislature must make a compelling showing that the Attorney General is not adequately representing its interests for intervention to be appropriate. *Id.* It has not done so, pointing only to minor differences in litigation strategy. "And '[w]hen a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has rested its claim for intervention entirely upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status." *Callahan*, 42 F.4th at 1021 (quoting *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir. 1997)). Here, the Legislature has failed to identify any interest in this litigation that deviates from the interest of the State of Idaho: both parties continue to forcefully defend the constitutionality of the challenged law.

The mere differences in litigation strategy that the Legislature identifies bear no resemblance to the divergence of interests in cases where courts have granted intervention as of right. As discussed above, this case is a far cry from *Berger*, where plaintiff's selected defendants did not mount a robust

defense of the constitutionality of the challenged law. *See Berger,* 142 S. Ct. at 2199. This case is also unlike Ninth Circuit cases in which courts have found intervention as of right to be justified. *See, e.g.*, *California ex rel. Lockyer v. United States*, 450 F.3d 436, 444 (9th Cir. 2006) (granting intervention where the United States sought to defend the constitutionality of a federal statute by arguing for a limiting construction that would have excluded the conduct of the proposed intervenor-defendants from the statute's protections); *Citizens for Balanced Use*, 647 F.3d at 899 (granting intervention where environmentalist intervenor-defendants sought to defend an order limiting motorized vehicles in a national forest on the grounds that it was a necessary environmental protection whereas Forest Service defended the order on the grounds that it was compelled to do so by court order which the Forest Service was appealing and which the Forest Service thought was unnecessary). In both *Lockyer* and *Citizens for Balanced Use*, the parties to the lawsuit were seeking fundamentally different outcomes from the intervenors—outcomes that would actually have injured the intervenors and thus failed to protect their interests. *Cf. Callahan*, 42 F.4th at 1021 (disagreement over whether a case should have settled for the agreed-upon amount "amounts to a disagreement over litigation strategy" which was "insufficient to show that [defendant] did not adequately represent [intervenor's] interests.").

The State of Idaho, represented by the Attorney General, has mounted a forceful defense of the law, and the differences in preferred litigating strategy that the Legislature identifies do not render the Attorney General's representation inadequate. The Legislature cites largely matters of timing and briefing logistics. *See* Dkt. 105-1 at 8 (the Attorney General's office took the full time allotted under the local rules to file its motion for reconsideration, instead of a shorter period as the Legislature did); Dkt. 105-1 at 9 (Attorney General's office consented to a single consolidated response brief by the United States to both motions for reconsideration on the timeline triggered by the State's motion). This, the Legislature argues, demonstrates that the Attorney General's office doesn't feel the same sense of urgency in litigating this suit. But the Legislature has made no attempt to explain why a

difference of two weeks or a consolidated opposition brief matter at all. There is no indication that those two weeks have delayed a decision on the reconsideration motion. And the Legislature has not suffered harm from the injunction because the law was enjoined before it ever went into effect, maintaining the status quo. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004) ("The harm done from letting the injunction stand pending a trial on the merits . . . will not be extensive. No prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands."). If the Legislature felt that a two-week "delay" in briefing its motion for reconsideration was inappropriate, it could have filed a motion to expedite the briefing schedule, but it did not do so.[1]

These minor differences in litigation strategy do not suggest that the parties' interests have diverged. *League of United Latin Am. Citizens*, 131 F.3d at 1306 (denying intervention as of right based on intervenor's "bare allegation that the litigation is progressing too slowly" which could not "overcome the uncontroverted fact that [defendants] are more than adequately representing [intervenor's] primary interest in seeing Proposition 187 upheld."). Both the Legislature's and the State's motions for reconsideration argue that the court's decision was wrong for many of the same reasons. *Compare* Dkt. 101-1 at 14-17 (arguing the United States lacks a cause of action), 19; Dkt. 97-1 at 11 (same). Both the State and the Legislature filed motions for reconsideration (rather than seeking an immediate appeal or a stay of the injunction, for example), showing a similarity in litigation strategy. Any minor disagreements on timing and strategy do not reflect "fundamentally differing points of view between [a party and a proposed intervenor] on the litigation as a whole." *Citizens for Balanced Use*, 647 F.3d at 899.

Where the Legislature tries to show substantive differences from the Attorney General's litigation strategy, its allegations fall short. The Legislature quotes from several portions of the State's

[1] At one point, the Legislature stated that it "will oppose any motion to delay [the United States' response to the Legislature's motion for reconsideration] and, if such a motion is made, will file a counter-motion to expedite." Dkt. 99-1. The Legislature never filed a motion to expedite.

oral argument where, with the benefit of hindsight, it suggests it may have answered the Court's questions differently. Dkt. 105-1 at 12. But alternative oral argument responses are minor differences in litigating strategy and do not justify intervention as a matter of right under Rule 24(a). *See City of Los Angeles*, 288 F.3d at 402-03. Similarly, the fact that the Attorney General's office declined to make, or make more fully, some of the Legislature's preferred legal arguments does not establish a divergence of interests. For example, the Legislature faults the Attorney General's office for not relying more heavily on the "major questions doctrine," but that doctrine applies only to courts reviewing the actions of *administrative agencies* and does not apply here. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). These minor disputes about how to prioritize different legal arguments do not amount to a divergence of interests cognizable under Rule 24(a); rather, they are the common quibbles between a lawyer and his or her opinionated clients.

Here, both the State of Idaho and the Idaho Legislature defend the challenged law on the ground that it is a constitutional exercise of the authority of the State of Idaho to promote the State's interest in regulating abortion. Both defend the law as sound policy and resting on sound legal footing. Both dispute the United States' interpretation of EMTALA and preemption arguments as a constitutional overreach. Both have an identical interest in this litigation: to defend the constitutionality of the Total Abortion Ban. *Callahan*, 42 F.4th at 1021 (denying intervention where intervenor and Defendant had "the same interest in this litigation: to obtain civil penalties on behalf of the LWDA under PAGA."); *League of United Latin Am. Citizens*, 131 F.3d at 1306 (denying intervention where intervenor and defendant had the same "interest in seeing Proposition 187 upheld.").

Granting the Legislature intervention as of right in this case would pose the risk of turning this case into the "nine-headed Hydra" the Court feared in its prior order on the matter. Dkt. 27 at 15. The Legislature and the State of Idaho are part of the same entity, have identical interests in this

lawsuit, and are pursuing their identical objectives through virtually identical litigation strategies. The Legislature has not made a compelling showing that the State is inadequately representing their shared interest in defending the Total Abortion Ban and the Legislature has therefore failed to meet the requirements to establish that intervention as of right is warranted. *See Callahan*, 42 F.4th at 1021 n.5.

CONCLUSION

For the foregoing reasons, the Court should deny the Legislature's Renewed Motion to Intervene.

Dated: October 20, 2022

Respectfully submitted,

SAMUEL BAGENSTOS
General Counsel

PAUL R. RODRÍGUEZ
Deputy General Counsel

DAVID HOSKINS
Supervisory Litigation Attorney

JESSICA BOWMAN
MELISSA HART
Attorneys
U.S. Department of Health & Human Servs.
200 Independence Ave., SW
Washington, DC 20201

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

DANIEL SCHWEI
Special Counsel

/s/ Anna Deffebach
ANNA DEFFEBACH (DC Bar # 241346)
LISA NEWMAN
EMILY NESTLER
CHRISTOPHER A. EISWERTH
Trial Attorneys

JULIE STRAUS HARRIS
Senior Trial Counsel

U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 993-5182
anna.l.deffebach@usdoj.gov

Counsel for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant, and SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE, Intervenor-Defendants.	Case No. 1:22-cv-329-BLW

IDAHO LEGISLATURE'S MEMORANDUM OF LAW SUPPORTING ITS RENEWED MOTION TO INTERVENE

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

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INTRODUCTION

This motion takes up an invitation made by this Court for the Legislature to renew its motion to intervene if the course of this litigation reveals significant differences between the Legislature's litigating approach and that of the Idaho Attorney General's Office ("AGO"). Those differences are now palpable. To explain why full intervention is now warranted, the following sections describe critical procedural and substantive choices by the AGO that distinguish its perspective in this litigation from the Legislature's.

We are convinced, however, that delving into the differing litigation aims and tactics of the Legislature and the AGO is unnecessary. *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022), holds that federal courts should permit intervention as of right when a state applicant demonstrates that a state law expressly authorizes such intervention. Idaho law satisfies that qualification here. Idaho Code § 67-465 expressly authorizes the Legislature to intervene when a state law is challenged as unconstitutional or as preempted or in violation of state law. Because the United States challenges Idaho Code § 18-622 on all these grounds, Section 465 authorizes the Legislature to intervene expressly. *Berger* teaches that such a statutory delegation is entitled to respect in federal court. And that, we respectfully submit, is reason enough to let the Legislature intervene as of right.

ARGUMENT

I. This Court Left The Door Open To Reconsider Its Order Granting The Legislature Limited Permission To Intervene.

On August 13, 2022, this Court issued a memorandum decision and order denying the Legislature's motion to intervene as of right under Rule 24(a)(2). *See* August 13, 2022 Memorandum Decision and Order (Dkt. 27) ("Aug. 13th Order") at 1. That conclusion rested on the Court's determination that "the Legislature has failed to show that it brings a distinct state

interest to bear on this litigation that the State cannot adequately represent." *Id.* at 12. Although the Court granted the Legislature very limited permissive intervention, it left the door open to a renewed motion for intervention as of right. "[I]f during the course of this litigation the facts develop such that it becomes clear the State and Legislature's interests diverge, and the State can no longer adequately represent the Legislature's interests, the Court will entertain a renewed motion to intervene." *Id.* at 2. Since this Court made that statement, the facts have developed such that it is now abundantly clear that "the State and Legislature's interests diverge." Moreover, there are additional legal reasons supporting intervention. But we begin with a more straightforward approach, one that is consistent with the United States Supreme Court's recent decision in *Berger*.

II. *Berger* Controls this Case and Permits the Legislature to Intervene as of Right.

Federal Rule of Civil Procedure 24(a)(2) governs the Legislature's motion to intervene as of right. It provides that "the court must permit anyone to intervene" when the moving party "claims an interest relating to the … transaction that is subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *Berger* has given this rule its definitive explication and figured prominently in the Court's memorandum and order. *See* Aug. 13th Order at 8–12. To avoid needless repetition, we will rehearse only *Berger's* essential facts and reasoning here.

Berger held that the leaders of North Carolina's legislative houses could intervene as of right in a civil action challenging the constitutionality of a state voter identification law. *Id.* at 2198. That holding naturally flows from the principle that "federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law." *Id.* at 2201. A contrary

understanding "would risk a hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments." *Id.* Federal interests come into play as well. "Permitting the participation of lawfully authorized state agents promotes informed federal-court decision making and avoids the risk of setting aside duly enacted state law based on an incomplete understanding of relevant state interests." *Id.* at 2202.

Berger chiefly rests on this insight—that federal courts should not interpose artificial barriers to intervention when state law authorizes more than one state officer or body to defend state law in court. *Id.* at 2206 ("Ordinarily, a federal court must respect that kind of sovereign choice, not assemble presumptions against it."). There, a North Carolina statute authorized the legislative leaders to represent the state when its laws were challenged. *See* N.C. Gen. Stat. Ann. § 1-72.2 (2021). Yet lower courts applied a presumption against intervention on the ground that "the legislative leaders' interest would be adequately represented by the Governor and the [State Board of Elections] and their legal representative, the attorney general." *Berger*, 142 S. Ct. at 2199. The Supreme Court firmly rejected that presumption. "Any presumption against intervention is *especially* inappropriate when wielded to displace a State's prerogative to select which agents may defend its laws and protect its interests. Normally, a State's chosen representatives should be greeted in federal court with respect, not adverse presumptions." *Id.* at 2204–05.

Without the obstacle of such presumptions, the "proper resolution" of the legislators' motion to intervene became clear. *Id.* at 2205. Not only did North Carolina law expressly authorize intervention, but genuine differences divided the State's litigating approach. The Attorney General's decision not to offer "expert-witness affidavits" in support of the challenged law; the Board's failure to "seek a stay" of a preliminary injunction that prevented the operation of state law; and the Attorney General's interests as "an elected official" in catering to "the voting public"

or litigating in sympathy with "the Board's administrative concerns"—these considerations sufficed to find that the executive branch's representation of the legislature's interests and concerns was inadequate.

> They [legislative leaders] are not burdened by misgivings about the law's wisdom. If allowed to intervene, the legislative leaders say, they will focus on defending the law vigorously on the merits without an eye to crosscutting administrative concerns. And, they add, the differences between their interest and the Board's in this case demonstrate why state law empowers them to participate in litigation over the validity of state legislation—alive as it is to the possibility that different branches of government may seek to vindicate different and valuable state interests.

Id. at 2205.

The party on the other side of the table, the NAACP, complained at the impact of intervention on "trial management." *Id.* While acknowledging that "a proliferation of motions to intervene may be a cause for caution" in some instances, the Court saw no prospect of "a cascade of motions" in that case. *Id.* What's more, it noted that "federal courts routinely handle cases involving multiple officials sometimes represented by different attorneys taking different positions." *Id.* at 2206. And any burdens resulting from allowing the intervention of a single additional party consisting of two legislators "fall well within the bounds of everyday case management." *Id.*

Berger controls here. Like the North Carolina legislative leaders, the Idaho Legislature seeks to intervene under the authority of a state statute that this Court did not account for in its initial decision:

> INTERVENTION IN ACTIONS REGARDING CONSTITUTIONALITY OF A STATUTE. When a party to an action challenges in state or federal court the constitutionality of an Idaho statute, facially or as applied, challenges an Idaho statute as violating or being preempted by federal law, or otherwise challenges the construction or validity of an Idaho statute, either or both houses of the legislature may intervene in the action as a matter of right by serving a motion upon the parties as provided in state or federal rules of civil procedure, whichever is applicable.

Idaho Code § 67-465.

This statute plainly authorizes the Legislature to intervene in litigation aimed at challenging the validity of Idaho Code § 18-622. The complaint brought by the United States both "challenges … the constitutionality of an Idaho statute" and "challenges an Idaho statute as violating or being preempted by federal law." *See* August 2, 2022 Complaint (Dkt. 1), ¶ 6 ("In this action, the United States seeks a declaratory judgment that Idaho's law is invalid under the Supremacy Clause and is preempted by federal law to the extent that it conflicts with EMTALA."). And like the North Carolina statute in *Berger*, Section 67-465 reflects Idaho's judgment that "leaders in different branches of government may see the State's interests at stake in litigation differently" and that "important public perspectives would be lost without a mechanism allowing multiple officials to respond." *Berger*, 142 S. Ct. at 2197. Intervention should be quite straightforward.

The Aug. 13th Order at 12 distinguished *Berger* on the ground that "the Legislature has failed to show that it brings a distinct state interest to bear on this litigation that the State cannot adequately represent." We respectfully disagree. Section 67-465 vests the Legislature with a distinct legal interest in the defense of state law. It effectively designates the Legislature as one of those "voices the State has deemed crucial to understanding the full range of its interests." *Berger*, 142 S. Ct. at 2201. That distinct interest is sufficient by itself to satisfy *Berger*.

Berger cannot be fairly read for the principle that a party moving for intervention as of right must also demonstrate sufficient differences in litigation aims and tactics from the existing parties to satisfy a skeptical court. Instead, *Berger* implicitly endorses the notion that "if [state] law authorizes participation by the legislative leaders on behalf of the State a federal court should find the interest requirement of Rule 24(a)(2) satisfied." *Id.* at 2202. Because Idaho law authorizes intervention by the Legislature to defend a state law assailed for unconstitutionality or an alleged violation of federal law, that same principle justifies intervention here.

When state law authorizes intervention expressly, requiring a state legislature to satisfy a court that its interests are distinct enough to justify intervention essentially smuggles in a kind of "presumption against intervention" condemned in *Berger*. 142 S. Ct. at 2204. *Berger's* teaching was that "a State's chosen representatives should be greeted in federal court with respect, not adverse presumptions. *Id.* at 2205. Having to produce evidence that a would-be intervenor's interests significantly diverge from the state's is unnecessary to satisfy the "minimal burden" required under Rule 24(a) when intervention is sought by "duly designated state agents seeking to vindicate state law." *Id.*

Concerns about case management should not overshadow the central point of *Berger*—that federal courts should respect a state's "sovereign choice" to divide authority for representing a state in court between the state attorney general and the state legislature. *Id.* at 2206. Only Justice Sotomayor complained that that rule would "foist" unacceptable burdens on federal courts. *Id.* at 2211 (Sotomayor, J., dissenting). Echoing that dissenting complaint, this Court expressed concern about the burdens of "allow[ing] a legislature the right to intervene in every federal case whenever it says it should be allowed to do so *and* without requiring the legislature to possess a distinct interest or that its interests are inadequately represented." *See* Aug. 13th Order at 15. But Idaho law, section 67-465, contains multiple limiting principles. Intervention is authorized only when a lawsuit "challenges … the constitutionality of an Idaho statute" or "challenges an Idaho statute as violating or being preempted by federal law, or otherwise challenges the construction or validity of an Idaho statute." Idaho Code § 67-465. This is hardly intervention-at-will. As in *Berger*, granting the Legislature's motion does not threaten to open the floodgates for other would-be intervenors. 142 S. Ct. at 2206. As a practical matter, accommodating the Legislature as a

Defendant-Intervenor will impose no greater logistical burdens than those "within the bounds of everyday case management." *Id.*

Under *Berger*, then, the Idaho Legislature should be allowed to intervene as of right because Idaho law authorizes it expressly.

III. Even If *Berger* Did Not Control, the Course of this Litigation Demonstrates that the Attorney General's Office Is Not Representing the Legislature's Interests Adequately.

A. Different Approaches to procedural matters distinguish the Legislature's litigation posture from the Attorney General's.

Suppose, contra *Berger*, that the Legislature is obligated to show that its litigation aims or tactics significantly differ from the AGO's. This Court openly invited the Legislature to renew its motion to intervene if such differences arose. "[I]f during the course of this litigation the facts develop such that it becomes clear the State and Legislature's interests diverge, and the State can no longer adequately represent the Legislature's interests, the Court will entertain a renewed motion to intervene." Aug. 13th Order at 2. Unfortunately, events have shown that the AGO has pursued a different course than the Legislature. Those differences, encompassing procedural and substantive matters, demonstrate that the AGO's representation of the Legislature's interests is inadequate under Rule 24(a)(2).

Before mapping out the territory separating the Legislature from the AGO, we stress that *Berger* did not set a high bar when deciding whether such differences furnish a sufficient reason to find representation inadequate. Failure to offer expert-witness affidavits to counter those introduced by a party opponent, failure to seek a stay from a preliminary injunction, the removability of the state officials acting as defendants, and the nature of the Attorney General as "an elected official"—these were enough to "warrant participation by multiple state officials in federal court." *Berger,* 142 S. Ct. at 2205.

Differences between the Legislature's perspective and the AGO's actions rise to at least the standard outlined in *Berger*. In describing those differences, we do not wish to be misunderstood as "[c]ast[ing] aspersions" on the AGO's litigating choices. *Id.* at 2205. Those choices illustrate the reality that "leaders in different branches of government may see the State's interests at stake in litigation differently." *Id.* at 2197. The AGO may be animated by "crosscutting administrative concerns" that complicate its defense of Idaho Code § 18-622. It should insult no one to say that the Legislature "seek[s] to give voice to a different perspective" from the one presented by the AGO. *Id.* at 2205. Like the legislative leaders in *Berger*, the Legislature has shown abundant commitment to single-mindedly "focus on defending the law vigorously on the merits." *Id.* at 2205.

Differences in approach between the AGO and the Legislature are evident, to begin with, in certain procedural decisions.

1. *Delay in submitting a motion for reconsideration on the preliminary injunction.*

The Legislature filed a motion for reconsideration of the decision granting a preliminary injunction on September 7, 2022—14 days after the Court's decision granting a preliminary injunction. *See United States v. State of Idaho*, No. 1:22-cv-00329-BLW, 2022 WL 3692618 (D. Idaho Aug. 24, 2022). Not until two full weeks later, September 21, 2022 (the deadline for filing), did the AGO submit its own motion for reconsideration. This additional time evinces a lack of a sense of urgency, a lack sharply at odds with the Legislature's perspective—that every day that passes with this overbroad and legally erroneous preliminary injunction in place is damaging to vitally important Idaho interests and an affront to the people of Idaho and their elected representatives.

2. Non-opposition to the Government's motion to extend time.

On September 15, 2022, the United States filed a motion to extend time for submitting a response to the Legislature's motion for reconsideration on the preliminary injunction. (Dkt. 99). Specifically, the Government requested a delay until "21 days after the State files its motion for reconsideration." Mot. to Extend, at 1. Postponing the response was merited, the Government argued, because it would otherwise have to submit separate responses to the Legislature's and AGO's motions for reconsideration and because the resulting delay "would be no more than two weeks." *Id.* at 3. The following day, the AGO essentially acquiesced in this play for delay when it filed a document styled "State of Idaho's Partial Non-Opposition to United States' Motion to Extend Briefing Schedule Regarding Motions for Reconsideration." (Dkt. 100).

Now ordinarily, a motion for extension of time is a reasonable means of avoiding conflicts for lawyers engaged in multiple and sometimes conflicting representations. Acceding to such a motion is a hallmark of civil and civilized legal practice and is something that counsel for the Legislature nearly always does. But this is no ordinary case. The United States demanded and got expedited—one might say breakneck—briefing schedules when section 622 was about to come into force. Indeed, the Government in its opposition to the Legislature's motion to intervene (Dkt. 15) argued against any interference with what it described as an "extraordinarily expedited" briefing schedule. *See generally,* United States' Response to the Idaho Legislature's Motion to Intervene (Dkt. 23), p.8.

The resulting burdens on the Legislature's two-man litigation team were irrelevant then. The parties and the Court were engaged in a full-out effort to determine whether Section 622 would be enjoined. Only five days separated the Government's reply to the motion for preliminary injunction and the Memorandum Decision and Order granting the preliminary injunction. Compare

the August 19, 2022 Reply Memorandum in Support of Motion for Preliminary Injunction (Dkt. 86) and August 24, 2022 Memorandum Decision and Order (Dkt. 95).

We rightly fault the Government for its Janus-faced approach. Speed was of the essence when it served the Government's needs, but the brake lights came on the moment that the Government had the injunction in hand. It is at the very least puzzling that the AGO would file a non-opposition to the Government's self-serving efforts to delay consideration of the Legislature's motion. The Legislature's view is simple. Again, with respect, every day that passes with the preliminary injunction in place damages vital Idaho interests, is an affront to the people of Idaho and their elected representatives, and can be touted as an ongoing victory of the current Administration's policy over Supreme Court precedent and, more fundamentally, as a victory of federal power over Idaho's fundamental right of self-government. Delay now is no more tolerable to the Legislature than it was to the United States when the injunction was a wish rather than a reality.

In sum, delay in ending the overbroad and erroneous preliminary injunction is intolerable to the Legislature, while the AGO's own recent conduct says that delay is fine by it.

B. Substantive disparities separate the Legislature's defense of Idaho law from the Attorney General's.

1. The AGO declined to present the Legislature's substantial legal and constitutional objections to the preliminary injunction motion.

Hobbled by the order granting permissive intervention only in part, counsel for the Legislature forwarded to the AGO a fully drafted legal memo describing multiple legal and constitutional arguments. The AGO refused to incorporate the memo's arguments into the State's memorandum opposing preliminary injunction. Concerned that the Court would issue the injunction without considering its weighty, substantive legal arguments, the Legislature then

immediately moved for leave to submit those legal arguments on its own behalf. *See* August 17, 2022 Idaho Legislature's Motion for Leave to File Legal Arguments (Dkt. 69) ("The Legislature's unique legal arguments were not made by the Attorney General's Office in its 11:51 p.m. filing last night.") and attached Exhibit (Dkt. 69-1 ("Unique Legal Arguments of the Idaho Legislature in Opposition to the Government's Motion for Preliminary Injunction.")). The Court denied that motion. (Dkt. 75 (Docket Entry Order) (Aug. 17, 2022).) This failure highlights both the distinctly different approaches to countering the Government's preliminary injunction motion and why not allowing the Legislature to submit legal arguments was indeed harmful to the Legislature's unique interests.

2. *The decision granting a preliminary injunction addressed none of the Legislature's constitutional objections.*

Significantly, given the Legislature's inability to submit legal argument, the AGO's only constitutional argument under the Spending Clause was deemed insufficiently developed because it was stated only in a footnote. This Court ruled as follows:

> To the extent this "concern" is an argument, it is not sufficiently developed here. *Cf*. Indep. Towers of Wash. v. Washington, 350 F.3d 925, 930 (9th Cir. 2003) ("We require contentions to be accompanied by reasons."). The State cannot challenge the constitutionality of a 35-year-old federal statute in a passing footnote.

See Aug. 13th Order, at 14.

Again, the AGO's decision to not focus on the constitutional flaws in the Government's position is sharply distinguishable from the Legislature's detailed and substantial arguments contained in the memo presented to the AGO but not used by it and then not allowed by this Court.

3. *During the hearing on the Motion for Preliminary Injunction, the Attorney General made concessions damaging to the defense of Idaho law.*

In addition to not making substantive constitutional arguments, at oral argument, counsel for the AGO took positions at odds with a vigorous defense of Idaho Code § 18-622:

- AGO counsel insisted on pressing the argument that the United States was not entitled to an injunction because it had failed to satisfy the legal standard for a facial challenge. *See* Transcript of Proceedings of August 22, 2022 Hearing ("Tr.") at 25:20-23. He did so even after the Court questioned the premise of that argument, pointing out that the United States did not contend that "the entire statute is invalid, only that it's invalid when applied in an emergency room setting where there are EMTALA obligations." Tr. 26:2-6. And even after the Court asked, "Why does it [the AGO's over-labored facial-challenge argument] matter?" *Id*.

- AGO counsel conceded, on his proudly asserted authority as a single deputy attorney general, that ending an ectopic pregnancy would be an abortion subject to the prohibitions of the 622 Statute. Tr. 24:19-22, 24:25-25:4. This despite the Legislature's contrary explanation that "[a]n ectopic pregnancy is not an abortion … [b]ecause it will never result in a live birth …." Tr. 58-59.

- AGO counsel conceded hypotheticals posed by the Court, even when those hypotheticals rested on an adverse interpretation of the 622 Statute. Tr. 48:3-54:12, 54:14-55-11. The Legislature's counsel vigorously addressed those same hypotheticals in a way exactly contrary to the AGO's approach. Tr. 54-55, 58-59.

These distinctions are readily apparent from the transcript of the hearing, and they are material. It does not matter at all that this Court may find the AGO's approach more congenial than the Legislature's materially different approach. All that matters is that the two approaches are just that—different. The point is, as highlighted by *Berger*, that the Legislature would make and will continue to make substantively different arguments in defense of the 622 Statute, something the August 13th Order has greatly hindered, even prevented, the Legislature from doing.

4. The AGO's Motion for Reconsideration on the Preliminary Injunction dramatically differs from the Legislature's earlier filed motion.

Given the important procedural and substantively different arguments in opposing the motion for preliminary injunction, it should come as no surprise that the Legislature and AGO have different approaches to the motions requesting reconsideration currently pending before this Court. *Compare* Legislature's Brief in Support of Motion for Reconsideration of Order Granting Preliminary Injunction (Dkt. 97-1) and Memorandum in Support of State of Idaho's Motion to

Reconsider Preliminary Injunction (Dkt. 101-1). Whereas the Legislature's motion for reconsideration is broad, focusing both on the scope of EMTALA and on legal and constitutional errors, the AGO's brief is significantly limited in scope—asserting error primarily in the context of certain subsections of EMTALA and Section 622 interpretation. Again, notwithstanding the AGO's prior knowledge of the arguments that the Legislature is making, the AGO has chosen a decidedly different direction.

The AGO's brief was filed on September 22, 2022—15 days after the Legislature filed its motion, with the AGO thus having ample time to review and consider the Legislature's arguments. However, there is no blanket or precursory statement in the AGO's supporting memorandum that the AGO is adopting the Idaho Legislature's brief. Rather, the AGO filed its own motion and supporting brief that merely singles out some of the Legislature's arguments—again, relegating important constitutional arguments, like the "major questions doctrine," to a mere footnote and even casting doubt on the applicability of those constitutional theories: "To the extent this lawsuit arises from this agency action—an issue that is currently unclear—the Court's interpretation of EMTALA and the associated Order violates the major questions doctrine and the State incorporates the Legislature's argument contained in Section III(B)(1). *See* Memorandum in Support of State of Idaho's Motion to Reconsider Preliminary Injunction, at 3, fn. 1 (Dkt. 101-1). Then, on September 28, 2022, the AGO filed a document styled "State of Idaho's Non-Opposition to Idaho Legislature's Motion for Reconsideration" (Dkt. 97). There, the AGO expressed its mere non-opposition to the Legislature's motion—and not a joinder. Once again, the AGO's own actions separate its legal position from the Legislature's.

CONCLUSION

The Legislature's legal position in this case can be simply stated. Section 18-622 is a lawful exercise of Idaho's authority to regulate abortion, as confirmed by the United States Supreme Court in *Dobbs*. The complaint in this case reflects the Administration's determination to thwart *Dobbs.* In pursuit of that aim, the United States has brought a claim against the State of Idaho that rests on a fundamental legal error. EMTALA does not mandate abortion as a potential medical treatment for women in distress. What's more, Congress plainly expressed its desire to avoid preempting State laws concerning the regulation of medical care. By seeking to leverage an obscure corner of the U.S. Code into a nationwide abortion mandate, the United States has interpreted EMTALA in a way that creates multiple legal and constitutional problems—beginning with the usurpation of Idaho's power to regulate abortion as determined through the democratic process. Finally, with respect, the preliminary injunction rests on serious legal errors that we have asked the Court to correct.

These arguments uniquely advanced by the Legislature—whether or not they prevail before this Court—are serious and well-founded in law. They deserve to be fully ventilated in a court of law. If Idaho law is to be preempted by EMTALA despite *Dobbs*, that determination would be put on a more solid footing by allowing the Legislature to present the full range of arguments at its disposal, something that, as demonstrated above, has not thus far happened—and will not happen if this Court continues to turn a deaf ear to the Legislature's full voice as it has heretofore done in conformity with its Aug. 13th Order.

For all these reasons, the Aug. 13th Order should be vacated and a new order issued allowing the Legislature to intervene as a matter of right.

Dated this 4th day of October, 2022.

/s/ Daniel W. Bower
Daniel W. Bower
MORRIS BOWER & HAWS, PLLC

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2022, 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

Brian V Church
Clay R. Smith
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Alan Wayne Foutz
Office of the Attorney General
brian.church@ag.idaho.gov
crsmith73@outlook.com
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov
alan.foutz@ag.idaho.gov

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, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, 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
Indiana, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming, Nebraska

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

/s/ Daniel W. Bower
Daniel W. Bower

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant,

and

SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE,

Intervenor-Defendants.

Case No. 1:22-cv-329-BLW

IDAHO LEGISLATURE'S RENEWED MOTION TO INTERVENE

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

The Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively the "Legislature") respectfully move to renew its previous Idaho Legislature's Motion to Intervene (Dkt. 15) in this civil action as intervenor-defendants pursuant to Federal Rule of Civil Procedure 24(a)(2), as interpreted and applied by *Berger v. N.C. State Conf. of the NAACP*, --U.S.--, 142 S. Ct. 2191 (2022) and as invited by this Court's August 13, 2022 Memorandum Decision and Order (Dkt. 27).

This Motion is further supported by Idaho Legislature's Memorandum of Law Supporting its Renewed Motion to Intervene.

Dated this 4th day of October, 2022.

/s/ Daniel W. Bower
Daniel W. Bower
MORRIS BOWER & HAWS, PLLC

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-Defendants

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BRIAN DAVID NETTER
DOJ-Civ
Civil Division
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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

Brian V Church
Clay R. Smith
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Alan Wayne Foutz
Office of the Attorney General
brian.church@ag.idaho.gov
crsmith73@outlook.com
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov
alan.foutz@ag.idaho.gov

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, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, 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 Indiana, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming, Nebraska

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

/s/ Daniel W. Bower
Daniel W. Bower

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief, Civil Litigation Division

MEGAN A. LARRONDO, ISB #10597
BRIAN V. CHURCH, ISB #9391
ALAN W. FOUTZ, ISB #11533
INGRID C. BATEY, ISB #10022
Deputy Attorneys General
CLAY R. SMITH, ISB #6385
Special Deputy Attorney General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
brian.church@ag.idaho.gov

JOAN E. CALLAHAN, ISB #9241
NAYLOR & HALES, P.C.
Special Deputy Attorney General
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Telephone: (208) 383-9511
Facsimile: (208) 383-9516
joan@naylorhales.com

Attorneys for Defendant State of Idaho

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant.

Case No. 1:22-cv-329

MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION TO RECONSIDER PRELIMINARY INJUNCTION (Dkt. 95)

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INTRODUCTION

This case is not about denying necessary medical care to save the lives of women. This case is about preserving for the State its sovereign power to regulate abortions within its boundaries. The Court erred when it found that Idaho Code § 18-622 directly conflicted with and was preempted by the Emergency Medical Treatment and Labor Act (EMTALA). The Court's order misinterpreted both the relevant state and federal statutes and, in so doing, created a nonexistent conflict that has significant federalism and state sovereignty concerns. After *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), states have the power to regulate, and even prohibit, abortions—EMTALA, a statute that was intended to ensure that all people receive emergency medical care regardless of ability to pay, did not suddenly take on new form to federalize abortion when *Roe v. Wade* was reversed. *Roe v. Wade*, 410 U.S. 113 (1973). The Court's interpretation of EMTALA unconstitutionally hijacks Idaho's power to regulate abortion and is the product of clear error. Moreover, the Court's injunction is internally inconsistent and failed to hold the United States to its heavy burden on a motion for preliminary injunction. Idaho asks that this Court reconsider its decision, vacate the preliminary injunction, and deny upon reconsideration the United States' request for a preliminary injunction.

LEGAL STANDARD

A motion to reconsider is appropriate where "the court has misapprehended the facts, a party's position, or the controlling law." *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019) (citation omitted). A motion to reconsider should be granted "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted).

ARGUMENT FOR RECONSIDERATION

I. The Court erred in its interpretation of EMTALA, resulting in an injunction that is internally contradictory and an interpretation of EMTALA that is at odds with the Medicare Act.

A. The Court's interpretation of stabilizing treatment does not align with the statutory definition and results in a contradictory injunction.

The Court's preliminary injunction has a clear error. The preliminary injunction begins by stating it will enjoin Idaho from enforcing Idaho Code § 18-622(2)-(3) "as applied to medical care required by [EMTALA]." Mem. Decision and Order, Dkt. 95 (Order) at 38. But in the very next sentence, the Court enjoins Idaho from certain acts when an abortion "is necessary to avoid . . ." certain emergency medical conditions. *Id.* at 39. That is not the standard specified by EMTALA, even if one were to assume that EMTALA requires certain medical treatment (it does not).

Under EMTALA, *if* an applicable hospital determines that the person has an emergency medical condition, *then* it must either provide for transfer to another medical facility or provide "within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to *stabilize* the medical condition." 42 U.S.C. § 1395dd(b)(1)(A) (emphasis added). This means that a hospital must, within its capabilities, provide "such medical treatment of the condition **as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely** to result from or occur during the transfer of the individual from a facility." *Id.* § 1395dd(e)(3)(A) (emphasis added); *see also* 42 C.F.R. § 489.24(d)(1)(i). This is not a "necessary to avoid" standard, which expands EMTALA requirements to a prevention, as opposed to stabilization, standard. The injunction also broadens EMTALA's reach by applying it to "any medical provider or hospital," not just those subject to EMTALA. *See* 42 U.S.C. §§ 1395dd(a)-(b), dd(e)(5)

The injunction also goes beyond the scope of the challenge to Idaho Code § 18-622. It purports to enjoin Idaho from "seeking to impose any other form of liability on" hospitals or medical providers that conduct an abortion under the novel "necessary to avoid" standard. Order 39. However, the United States only sought to enjoin enforcement of Idaho Code § 18-622. Dkt.

17-1 at 20 (asking the Court to enjoin Idaho "from enforcing Idaho Code § 18-622(2)-(3) as applied to EMTALA-mandated care."). That code section specifies the forms of liability that may be imposed. Thus, the injunction extends to other, unidentified "form[s] of liability" that are not contained in the challenged Section 18-622(2)-(3). *See* Fed. R. Civ. P. 65(d); *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1116 (9th Cir. 2012) ("Courts should not enjoin conduct that has not been found to violate any law."). In addition, the second sentence of the injunction does not limit itself to Idaho Code § 18-622. As currently written, the injunction appears to bar the State from enforcing its Fetal Heartbeat Act that has not been contested by the United States (as discussed during oral argument). That law remains effective where Idaho Code § 18-622 is unenforceable and contains its own sanctions for unlawful abortions. Idaho Code § 18-8805(4). Thus, the injunction's second sentence, as it is currently written, appears to impermissibly enjoin the Fetal Heartbeat Act, which is not at issue in this litigation.

B. The Court misunderstands EMTALA to force a state to allow a particular "treatment"—here the taking of an unborn child's life—which is inconsistent with EMTALA and the Medicare Act.

The Court's Order understands EMTALA to require a particular method of "care," even if the State does not permit the procedure in the circumstance identified.[1] Order 17 ("EMTALA-mandated abortions"); 19 (EMTALA obligates "abortion care"); 20 ("EMTALA requires abortions that the affirmative defense would not cover."); 21 (EMTALA "demands abortion care to prevent injuries that are more wide-ranging than death."); 31, 32 (faulting Idaho for "curb[ing] abortion as a form of medical care," which it believes frustrates "EMTALA's purpose.") In short, the Court understands EMTALA to mandate the medical procedures offered across the nation: If

[1] This interpretation of EMTALA flows from the interpretation advanced by the United States, which was promulgated by the July 11, 2022 CMS guidance and corresponding letter sent by HHS Secretary Becerra. To the extent this lawsuit arises from this agency action—an issue that is currently unclear—the Court's interpretation of EMTALA and the associated Order violates the major questions doctrine and the State incorporates the Legislature's argument contained at Section III(B)(1) of the Legislature's Motion for Reconsideration as to why the major questions doctrine has been violated. *See* Dkt. 97-1 at 10-11.

a physician believes an abortion would be a stabilizing treatment, the United States through EMTALA can force the State to allow the abortion, even if the State does not allow the abortion in that circumstance. The Court's conclusions regarding EMTALA reflects clear error.

Understanding EMTALA as mandating abortions as medical care is an afront to the State's sovereignty and police power. *Dobbs* returned regulation of abortion to the states, subjecting such regulation to rational basis review, and beginning with "a strong presumption of validity." 142 S. Ct. at 2284 (citation omitted). In preemption cases, there is an assumption that must be made that "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (cleaned up). Here, regulation of the medical profession has long been recognized as a power of states. *E.g., Hawker v. New York*, 170 U.S. 189, 192-93 (1898). Indeed, constitutionally, Congress lacks the authority to regulate the practice of medical care or to intrude upon the states' prerogatives regarding criminal law. *Cf. United States v. Morrison*, 529 U.S. 598, 613, 618 (2000); John Yoo, *Schumer and Graham are both wrong on abortion: Congress can't legislate it*, The Wash. Post (Sept. 15, 2022, 2:54 PM EDT), https://www.washingtonpost.com/opinions/2022/09/15/schumer-graham-abortion-laws-unconstitutional/. Consistent with this constitutional limit, Congress has expressly disclaimed any power to regulate the practice of medical care in the Medicare Act. 42 U.S.C. § 1395. Instead, this is a power exercised by the States. *See* U.S. Const. amend. X.

The Court's understanding of EMTALA is also contrary to Congress's intent in enacting the Medicare and EMTALA statutes. As noted by the Idaho Legislature, Dkt. 97-1 at 8-9, Medicare prevents the federal government from interfering in the supervision or control of the practice of medicine or the manner in which medical services are provided. 42 U.S.C. § 1395. "Courts across the country uniformly hold that this section prohibits Medicare regulations that 'direct or prohibit any kind of treatment or diagnosis'; 'favor one procedure over another'; or 'influence the judgment of medical professionals.'" *Texas v. Becerra*, --- F. Supp. 3d ---, ---, 2022 WL 3639525, at *25 (N.D. Tex. 2022) (quoting *Goodman v. Sullivan*, 891 F.2d 449, 451 (2d Cir. 1989)). EMTALA

also recognizes that the "capabilities of the staff and facilities" at the hospital limit stabilizing treatment that a hospital is obligated to provide. 42 C.F.R. § 489.24(d)(1)(i). A long-extant statute such as EMTALA cannot now be given a transformative expansion of its regulatory reach by an allegedly just-discovered unheralded power to regulate abortions at the federal level. *Cf. West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022).

This understanding of EMTALA is confirmed by other Congressional enactments. Congress has made clear through the Weldon Amendment that the United States cannot through Medicare discriminate against hospitals or providers that do not provide abortions. *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, title V, § 507(d)(1), 136 Stat. 496 (2022). Any thought that EMTALA mandates the performance of abortions through the threat of the loss of federal funds for non-performance runs afoul of the Weldon Amendment.

Finally, the anti-commandeering doctrine prohibits Congress from issuing "direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). To be sure, the federal Congress can regulate private actors within its power, and when it does, preemption can occur. *Id.* at 1479-81. But Congress cannot directly compel state governments to enact and enforce a federal regulatory program, nor compel state officers (or officers of their political subdivisions) to administer or enforce a federal program. *Id.* at 1477 (citations omitted).

With these legal principles in mind, the Court's assertion that EMTALA mandates abortion is plainly incorrect. EMTALA requires hospitals to provide stabilizing treatment (or transfer), but EMTALA does not specify that an abortion must be a form of treatment available when the State has otherwise disallowed it.[2] Nor could it, because Congress cannot compel (or commandeer)

[2] This point is not inconsistent with *Matter of Baby "K"*, 16 F.3d 590 (4th Cir. 1994). There, a hospital *could* provide *and had* provided a treatment—meaning the treatment was not regulated by the state. However, the state allowed physicians to *elect* not to provide treatment he or she viewed as medically or ethically inappropriate. The Fourth Circuit found that the statute *allowing the physician election not to provide treatment* directly conflicted with the EMTALA requirement to provide stabilizing treatment. The *Baby "K"* issue is thus focused not on the manner of treatment

States to allow abortions. Medicare and EMTALA respect historic state regulation of the practice of medicine through the states' police powers. What EMTALA regulates are persons (hospitals accepting Medicare and their physicians) through a requirement to provide screening and, if necessary, treatment or transfer. This has long been understood to be the objective of EMTALA: It is a "Patient Anti-Dumping Act" enacted in response to a concern that "hospitals were 'dumping' patients who were unable to pay, by either refusing to provide emergency medical treatment or transferring patients before their conditions were stabilized." *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1255 (9th Cir. 1995). The Court erred in interpreting EMTALA to mandate that a State allow a particular "treatment."

II. The Court erred in its interpretation of Idaho Code § 18-622.

Having first misunderstood EMTALA to require the performance of abortions, the Court then misunderstood Idaho Code § 18-622 to prevent the performance of abortions in those circumstances when it understood EMTALA to require them. The Court did this by erroneously viewing the affirmative defense in Idaho Code § 18-622(3) as unclear and ambiguous. It said the statute lacked "clarity" "because of the statute's ambiguous language and the complex realities of medical judgments." Order 27. It interpreted Section 622(3) to require "the patient's death must be imminent or certain absent an abortion." *Id.* at 21, 27. The Court saw the quandary as being "when, precisely, does the 'necessary-to-prevent-death' language apply?" *Id.* at 28. The Court then characterized the affirmative defense as being an "empty promise" only "available to physicians once they make that often 'medically impossible' determination that death [i]s the guaranteed outcome." *Id.* at 29. Multiple problems exist with the Court's interpretation. Read properly, the

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(although in that as-applied case, one form of treatment was sought), but instead on whether a physician *can be allowed to choose* not to provide stabilizing treatment. This case stands opposite of the *Baby "K"* case. Idaho has disallowed abortion—removing this "treatment" option in all circumstances except where the exceptions (the affirmative defenses) identified in Section 18-622, apply. The fact that Idaho has disallowed an abortion in all other instances is something that this Court must respect under 42 U.S.C. § 1395—not a direct conflict with the stabilizing treatment requirement.

affirmative defense in Idaho Code § 18-622 allows the performance of an abortion when the woman's treating physician determines in good faith that the abortion is necessary to prevent her death—regardless of imminence.

A. The plain language of Idaho Code § 18-622(3) does not contain an imminency requirement.

The Court erred in reading an imminency requirement into Idaho Code § 18-622. *Id.* at 20; *see also id.* at 27. The plain language of Idaho Code § 18-622(3) does not contain an imminence or temporal requirement. *See State v. Clark*, 168 Idaho 503, 508, 484 P.3d 187, 192 (2021) (requiring a court to begin with the literal words, which are given their plain meaning). Even the United States did not add an imminence-of-death requirement. *E.g.,* Dkt. 17-1 at 8, 15. The Court was clearly incorrect to turn to statements from physicians in interpreting Idaho Code § 18-622(3). *See* Order 28 (citing Cooper Suppl. Decl., Dkt. 86-5; Corrigan Suppl. Decl., Dkt. 86-3). Furthermore, in Idaho, statutes should be construed to avoid a conflict with the state or federal constitution. *See State v. Gomez-Alas*, 167 Idaho 857, 866, 477 P.3d 911, 920 (2020). The Court turned toward, not away from, a constitutional issue.

B. Idaho Code § 18-622's affirmative defense related to the life of the mother is clear.

The Court expressed significant concern about a perceived lack of clarity in the affirmative defenses. Order 26-31. The Court's analysis hinted at whether the statute was vague as part of its ambiguity analysis, even though this issue was not raised by the United States. The Idaho Supreme Court is currently considering whether Idaho Code § 18-622 is vague.[3] But similar laws restricting abortion have likewise used phrases such as "necessary to prevent the death" or "necessary to

[3] As part of that analysis, the Idaho Supreme Court will interpret Idaho Code § 18-622. The Idaho Supreme Court is the "final arbiter[] of the meaning of state statutory directions." *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 536 (2021) (plurality opinion of Gorsuch, J., in part II-C) (citation omitted). As such this Court should defer its interpretation of Idaho Code § 18-622 and adopt the Idaho Supreme Court's interpretation of Idaho Code § 18-622. Oral argument on the pending Idaho Supreme Court petitions is currently set for September 29, 2022, and an opinion will issue in due course—potentially before this motion is fully ripe for the Court's consideration.

preserve her life," and state and federal courts have upheld their constitutionality.[4] Even Idaho's pre-*Roe* statutes contained such a requirement. Contrary to the Court's hinted analysis, the plain language of Idaho Code § 18-622(3) and "necessary to prevent the death of the pregnant woman" are well understood, and use language with meanings that withstood the test of time. The Court's concerns do not support the conclusion that the statute is ambiguous.

C. Even if the Court found the language ambiguous, the Court failed to follow Idaho law on how to determine the meaning of a statute.

Given that the Court found the plain language unclear, the Court committed clear error by not engaging in the construction necessary to give effect to legislative intent. *Nelson v. Evans*, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020). It took none of the steps to engage in statutory construction, such as looking at the context, public policy, and legislative history. (Nor was any of this argued or provided by the United States.) Instead, the Court relied on declarations from physicians. *See* Order 28-29. Its failure to follow what it was required to do was clear error.

D. The Court also erred in its understanding of the purpose of the Idaho law that weighs the balance of human life.

As expressed by the Idaho Legislature, Dkt. 97-1 at 4-6, an alternative way of looking at Idaho Code § 18-622 is as an exercise of the state's police power that values the life of an unborn child, but recognizes when an unborn child's life may be taken when both it and its mother are suffering an emergency medical condition. As the *Texas v. Becerra* court pointed out, EMTALA imposes on a physician the duty to screen and to treat or transfer "equally to the pregnant woman and her unborn child." *Texas*, 2022 WL 3639525, at *20. As such, "EMTALA's equal obligations to the pregnant woman and her unborn child create a potential conflict in duties that the statute does not resolve." *Id.* State law fills this void. *Id.* As such, it does not create a direct conflict (or make compliance with both physically impossible). *Id.* at *21. This alternative view of the statute

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[4] *E.g., Crossen v. Att'y Gen. of Ky.*, 344 F. Supp. 587, 590 (E.D. Ky. 1972) (three-judge court) (rejecting challenge that statute "does not describe what the probability of a woman's death must be in order to legalize the performance of an abortion" as "nothing more than a guise for the plaintiff's belief that the statute too rigidly regulates.")

is not an obstacle to "the full purposes and objectives of Congress": Idaho's policy weighing "however successful or unsuccessful—does not undermine the provision of care to the indigent or uninsured. It does not compel the 'rejection of patients.'" *Id.* at *22 (citations omitted). In fact, it carries out Congress's purpose. *Id.*

III. The Court erred in concluding that the United States met its heavy burden of showing that it is physically impossible to comply with both statutes and in showing that Idaho's law effectively nullified EMTALA.

A. The Court erred in finding that it was physically impossible to comply with both statutes.

The Court found it was physically impossible to comply with both statutes because: (1) EMTALA requires a physician to provide an abortion, regardless of what state law allows; (2) "Idaho statutory law makes that treatment a crime"; and (3) "[W]here federal law requires the provision of care and state law criminalizes that very care, it is impossible to comply with both laws." Order 19. The Court cited no authority for this proposition. The United States cited *Arrington v. Wong*, 237 F.3d 1066, 1073-74 (9th Cir. 2001), Dkt. 86 at 17, but that case offered no support for this proposition. The United States did not meet its heavy burden of showing it was a "physical impossibility" to comply with both statutes.

The first error in the Court's analysis is that it understands EMTALA to force a state to allow a particular "treatment," even if the State has decided not to allow the "treatment." This is incorrect, as discussed above. The second error is that it concludes it is physically impossible to comply with (1) a law that requires the provision of stabilizing treatment (within the bounds of treatment a physician and hospital can provide) and (2) a state law generally disallowing abortion, subject to two exceptions. But there is no direct conflict between the state law defining the bounds of care that can be provided and a requirement of EMTALA to provide stabilizing treatment within those bounds. Nor is it physically impossible for a physician to comply with both laws. In fact, EMTALA (and Medicare) expects that hospitals and physicians will work within the bounds of what they can do to provide treatment. The requirement in EMTALA, that stabilizing treatment be

provided "within the staff and facilities available at the hospital," embodies this point. *See also* 42 C.F.R. § 489.24(d)(1)(i) ("Within the capabilities of the staff and facilities available").

With respect to the abortions that Idaho allows through exceptions in Section 18-622, the affirmative defenses are not in direct conflict with any EMTALA requirement.[5] The key point is the medical professional can be "legally blameless" for providing an abortion that is within the bounds of Idaho law and that is stabilizing treatment. *See* Order 20. Idaho can choose to criminalize abortions except under three circumstances. *See Dobbs*, 142 S. Ct. at 2284. Its use of an affirmative defense ultimately allowing the medical professional to be "legally blameless," means that it is not impossible to comply with both statutes.

Though the Court faults Idaho's policy of only allowing two exceptions, comparing it to other situations where the Court understands an abortion could be stabilizing treatment, Order 20, this again misunderstands what the State can do (control types of "treatment") as compared to what EMTALA requires: treat or transfer within the bounds of the treatments the State authorizes. And although the Court ultimately asserts that EMTALA is "broader than the affirmative defense on two levels," Order 21, those two "levels" flow from the misunderstanding discussed above—the Court's misunderstanding that EMTALA can require abortions in circumstances that a State law does not allow.

Finally, the Court observes that "neither the State nor the Legislature have convinced the Court that it is possible for healthcare workers to simultaneously comply with their obligations under EMTALA and Idaho statutory law." Order 24. The clear error in this statement, which the State assumes is a summation of the Court's reasoning, is that the Court says it placed the burden on the Defendant to prove the likelihood of success element with respect to impossibility. That is contrary to well-established law requiring that the movant, by a clear showing, carry the heavy

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[5] Although the Court, Order 20, and United States, Dkt. 86 at 7, see a difference between an exception and an affirmative defense, affirmative defenses deriving from statutes are generally understood to be exceptions to statutory liability. *See, e.g., United States v. Pearson*, 274 F.3d 1225, 1232-33 (9th Cir. 2001); *United States v. Freter*, 31 F.3d 783, 788 (9th Cir. 1994).

burden of establishing they are entitled to the preliminary injunction. *Earth Island Institute v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

B. There cannot be a direct conflict because EMTALA's obligations are triggered by the voluntary choice of hospitals.

There was also error in finding that the United States met its burden to demonstrate physical impossibility for dual compliance and a direct conflict between EMTALA and Idaho Code § 18-622. There can be no impossibility sufficient to enjoin a validly enacted state statute that applies uniformly where EMTALA is not mandatory and not a law of general applicability. Hospitals and providers are not required to serve Medicare patients or to bill Medicare for their services. Those are voluntary choices. The fact that conditions to Medicare funding are codified does not change the fundamental nature that those provisions only apply when voluntarily agreed to by the participant. There is simply no impossibility to comply with two generally applicable laws. In fact, it is impossible to violate EMTALA, even in circumstances identified by the Court, unless a hospital or provider has voluntarily entered into an agreement. To hold otherwise, and find a direct conflict between EMTALA and Idaho law, is to leverage federal policy interpretations to usurp and allow private entities to contract away the sovereign's constitutional interest.

C. Idaho's regulation of abortion does not nullify the anti-patient-dumping purpose of EMTALA.

EMTALA's express savings clause, 42 U.S.C. § 1395dd(f), begins by saving "any State or local law requirement, *except* to the extent that the requirement directly conflicts with a requirement of [EMTALA]." (emphasis added). This Court must give "great weight to Congress's inclusion" of the savings provision. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1213 (9th Cir. 2020). Under obstacle preemption, the Court would have to find that the state law essentially nullifies or defeats the federal law's purpose. *Id.* at 1214. The United States did not meet its burden.

The Ninth Circuit concluded that Congress' purpose with EMTALA was to "respond" to a concern "that hospitals were 'dumping' patients who were unable to pay, by either refusing to

provide emergency medical treatment or transferring patients before their conditions were stabilized." *Eberhardt*, 62 F.3d at 1255; *accord Hardy v. N.Y.C. Health & Hosp. Corp.*, 164 F.3d 789 (2d Cir. 1999); *Marshall v. East Carroll Parish Hosp.*, 134 F.3d 319, 322 (5th Cir. 1998) (collecting cases). In contrast, this Court found that "Congress's clear purpose was to establish **a bare minimum of** emergency care that would be available to all people in Medicare-funded hospitals." Order 25 (emphasis added). But the *Arrington* case the Court cites does not use that language, and it's clear that the phrase "adequate emergency medical care" as used in the case is directed at ensuring that persons arriving at an emergency medical department are not dumped—not requiring particular care or its quality.[6] *See Marshall*, 134 F.3d at 322 (noting that required screening "is not judged by its proficiency in accurately diagnosing the patient's illness, but rather by whether it was performed equitably in comparison to other patients with similar symptoms"); *see also Bryan v. Rectors & Visitors of Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996) ("Its core purpose is to get patients into the system who might otherwise go untreated . . ."). The Court therefore erred by recharacterizing the purpose of EMTALA.

The Court also erred in finding that Idaho's law stands as an obstacle to EMTALA's purposes. Idaho's policy choice of not allowing the taking of an unborn child's life except as identified by two affirmative defenses does not nullify Congress' purpose of ensuring that all individuals who arrive at an emergency medical department receive care, regardless of their insurance status. Furthermore, the fact that Congress chose not to impose certain sanctions as part of EMTALA, *see* Order 32, is irrelevant given that States can criminalize abortion and thus impose

[6] The *Arrington* case cited *Vargas v. Del Puerto Hospital*, 98 F.3d 1202, 1205 (9th Cir. 1996), which in turn cited *Eberhardt*, 62 F.3d at 1255. As discussed above, *Eberhardt* understood EMTALA's purpose was to respond to patient dumping.

consequences on those persons who take an unborn child's life outside of the exceptions Idaho recognizes.[7]

Nor do the United States' doctors' speculative statements establish that Idaho Code § 18-622 nullifies EMTALA's anti-patient dumping purpose. The doctors' concern about delaying care is unfounded, given their misinterpretation of Idaho Code § 18-622. *See* Order 32. Likewise, the speculative concerns about recruiting OB/GYNs, *id.* at 34, and whether this will result in "fewer providers performing health and life-saving abortions," *id.*, shows no obstacle to EMTALA, as EMTALA does not regulate hospital staffing. EMTALA specifically recognizes that stabilizing treatment must consider the capabilities of the hospital and its staff. Simply because Idaho's policy choice does not align with the federal government's or individual doctors' policy preferences, does not establish a direct conflict with EMTALA.

The Court is simply wrong to assert that EMTALA had a purpose of establishing that all individuals "have access to a minimum level of emergency care"; i.e., that EMTALA mandates abortions. *Id.* Idaho has chosen a uniform policy of disallowing abortions subject to two exceptions applicable to insured and uninsured persons alike. Idaho's policy choice does not directly conflict with EMTALA; it does not nullify EMTALA's anti-patient dumping purpose.

IV. When the Court grants reconsideration, it should find that the United States does not have a likelihood of success on the merits.

Because the federal government cannot force the state to adopt a particular "treatment," this Court should conclude that the United States has no likelihood of success with respect to abortions that Idaho does not allow. With respect to the abortions that Idaho allows—where the

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[7] As an aside, the Court thought Congress was careful in avoiding sanctions that could result in a decrease in available emergency care. Order 34. Yet, the exact opposite is true; the very same House Judiciary Committee report, *see id.* at 26, recommended "a strong incentive" of "extend[ing] the civil fines provision to the responsible physician, so that the physician, like the hospital, could be fined." H.R. Rep. No. 99-241, pt. 3, at 6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 726, 728. And indeed, physicians are subject to civil penalties of $50,000 per violation. 42 U.S.C. § 1395dd(d)(1)(B).

physician determines in his or her good faith medical judgment that the abortion is necessary to prevent the death of the mother, and in the cases of rape or incest—the Court should conclude there is no direct conflict with EMTALA. Thus, the Court should find the United States has not carried its burden of demonstrating a likelihood of success with respect to these abortions.

V. When the Court grants reconsideration, it should find that the other factors support denying the preliminary injunction.

Additionally, when the Court grants reconsideration, the Court should find that there is no irreparable harm to the United States, given that the State has acted within its bounds. *See also* Dkt. 66 at 17-18. The Court should, instead, find that Idaho will suffer irreparable harm if an injunction is issued because the injunction would invade Idaho's sovereign interest in regulating abortion. Likewise, the Court should find that the public interest favors Idaho continuing to regulate within the realm stated by the United States Supreme Court. As noted, Idaho will be harmed by disallowing the effectuation of its policy, even in this limited area. *See id.* at 18-20 (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)).

VI. The district court erred in concluding that the United States had a cause of action.

In response to the State's contention that the United States did not have a cause of action on which to proceed under the Supremacy Clause, the Court concluded that the suit was appropriate because the United States was bringing this action in equity. Order 13. However, the Court erred in failing to address whether Congress' chosen remedial scheme foreclosed such an action. *See* Order 13-14; Dkt. 66 at 7; *see also* Dkt. 80 at 8-9. Any suit in equity is barred here because Congress provided an extensive remedial scheme in which the United States could redress any violation of EMTALA, whether through EMTALA's penalties or through the Medicare Act provider agreement enforcement provisions. 42 U.S.C. § 1395dd(d), 42 U.S.C. § 1395cc(b)(2). The State, like the Legislature, recognizes that *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015) bars this Court from hearing the claim brought by the United States. *See* Dkt. 97-1 at 11-12.

VII. The district court erred in concluding that the United States had standing.

The Order also erred in finding the United States had standing when the United States lacks the legal authorization to do so and failed to demonstrate an actual injury-in-fact. A federal court has an "independent obligation" to thoroughly examine a plaintiff's standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citation omitted). This is particularly critical where, as here, standing is "substantially more difficult to establish" because the United States is not the object of the hypothetical government action. *Lujan v. Defenders of Wildlife*, 504 US 555, 562 (1992) (citation omitted). The importance is heightened when the matter pertains to maintaining the foundations and separations of our dual form of government. *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979). However, the Order only gave cursory review to this foundational issue. And a closer examination of the three harms found in the Order show the United States lacks this threshold requirement. The United States conceded it does not assert third-party standing. Dkt. 86 at 3. Thus, it must assert an actual injury traceable to Idaho Code § 18-622.

The Order cited two cases concerning statutes very different from EMTALA to conclude the United States' sovereign interests were harmed. The first case, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), involved the False Claims Act, and addressed a relator's standing. Although not at issue in *Vermont*, the False Claims Act has an express statutory authorization for the United States to bring suit. 31 U.S.C. § 3730. EMTALA does not have that, and so it was error to rely on that case's legally distinct injury.

The second concerned the Immigration and Nationality Act, which preempted the field, and which concerned the United States' significant authority over immigration policy. *Arizona v. United States,* 567 US 387, 394-95, 401, 406, 416 (2012). The Supreme Court did not address standing as part of its analysis. Another vital distinguishing factor is that the INA contains express provisions for the United States to direct and closely supervise the state actors assisting in the enforcement of federal immigration law. *United States v. Arizona*, 641 F. 3d 339, 348-349, 351 (9th Cir. 2011), *rev'd in part on other grounds*, 567 U.S. 387 (2012). None of these elements are present within EMTALA. The Medicare Act expressly disclaimed regulating the practice of

medicine and EMTALA disclaimed preempting state regulation except when there is direct conflict. The State does not have a role in assisting in the enforcement of EMTALA; therefore, the United States does not direct or closely supervise the State's activities in this area. And, EMTALA is solely based on Congress's spending authority rather than any constitutional or inherent power. Thus, it is clear error to rely on *United States v. Arizona* to establish an injury to the United States sufficient to create standing in this matter.

It was also clear error to rely on *In re Debs,* 158 U.S. 564 (1895) to find standing in this case based on the "general welfare." Order 15. *Debs* contains the nebulous statement that an "injury to the general welfare, is *often* of itself sufficient to give [every government] a standing in court" even when the government does not have a direct pecuniary harm. 158 U.S. at 584 (emphasis added). Taking this statement in isolation, it appears to give standing in any action to a governmental entity acting in the "general welfare." But even setting aside the problem that this would virtually eliminate boundaries on governmental standing, what is the "general welfare"? This dispute exemplifies this dilemma where Idaho disagrees that the United States' policy preferences with regard to whether and to what extent abortion advances the "general welfare." *Dobbs* established that, in the abortion arena, States are responsible for acting for the general welfare.

Moreover, other courts grappling with this vague statement in *Debs* have not interpreted it in the same generalized manner as it was used in the Order. *See Mattson*, 600 F.2d at 1298-1299 (discussing cases). Specifically, the Ninth Circuit in *Mattson* considered whether the United States had standing to sue based upon several federal acts and programs. *Id.* at 1299, 1299 n.4. It also analyzed a line of cases including *Debs* and found that the United States lacked standing to assert claims where there was no property interest, interference with national security, or burden on interstate commerce. *Id.* at 1298-99. Hence, it found the United States lacked standing to redress a violation of a federal law requiring care and treatment for individuals with developmental disabilities because the United States' interest "ha[d] not extended beyond providing funds for the

various programs and acting in a supervisory role." *Id.* at 1299. Thus, Ninth Circuit precedent prohibits finding that the United States has standing here, where its interest is limited to providing and supervising Medicare funds.

Finally, the third harm used to justify standing is the United States' claimed benefit of its bargain in providing Medicare funds in exchange for emergency medical care treatment, or here, abortion. Order 15. However, EMTALA was enacted after *Roe*. Thus, it is a fallacy that the United States bargained for abortion when abortion was a constitutional right. The United States could not bargain for something that could not be withheld, even if private entities could bargain away the State's Tenth Amendment right.

Ultimately, EMTALA bargained for emergency medical care for patients who were unable to pay for emergency medical care. Although the United States is concerned that a provider will not provide an abortion when, in its opinion, it is the most desirable form of treatment, the record does not suggest that physicians would cease treatment or only observe a patient. Thus, there is no concrete, actual or imminent harm to the United States that a hospital will violate EMTALA by failing to provide treatment, or that such violation cannot be redressed through the authorized remedies.

VIII. The district court erred in concluding that the United States' understanding of EMTALA did not invade the State's Tenth Amendment reserved powers and that the interpretation of EMTALA amounted to coercive spending.

As noted by the Idaho Legislature, too, Dkt. 97-1 at 13-15, the Order erred in disregarding whether United States' interpretation of EMTALA and position in this litigation amounted to unconstitutionally coercing the State into surrendering its sovereign authority to regulate abortion. The Order erred in its conclusion that, because EMTALA was enacted 35 years ago, there could be no issue. Yet, EMTALA was enacted in the *Roe* era, and it is just now that the United States has asserted in this litigation that EMTALA requires, regardless of state law, that Idaho offer abortions.

As the U.S. Supreme Court described, Congress impermissibly puts a gun to the head of states when it threatens a substantial amount of the state's funds unless the state agrees to what the United States wants, calling this "economic dragooning." *NFIB v. Sebelius*, 567 U.S. 519, 581-82 (2012). The Spending Clause and the Tenth Amendment do not allow that action. *Id*. at 582. The *NFIB* Court primarily focused on two elements of the Medicaid expansion at issue. First, if a state did not comply with the new requirements that arose after acceptance and implementation of the Medicaid program, it risked the existing Medicaid funding upon which it relied. *Id*. at 580, 584. The second element was the significance of the financial inducement that was at stake. *Id*. at 582-84. In short, the two principals of an impermissible coercive scheme are (1) imposing new conditions for old money and (2) the significance of the threatened funds.

Here, the power to regulate abortion was returned to the states just months ago. However, it is Medicare funding for Idaho's hospitals that are put at risk unless the State chooses to surrender some of its sovereign power over abortion. The United States' position, fresh within the last two months, is that there is a new requirement under EMTALA: that states authorize abortions any time stabilizing treatment is needed. In other words, when Idaho hospitals accepted the EMTALA conditions, there was no legal tension between what the State could prohibit and what EMTALA required. Now, it is a new condition that the federal government seeks to require—that providers in Idaho be allowed to terminate the lives of unborn children in more circumstances than what the State would otherwise allow. Hence, the federal government has imposed a new post-acceptance condition on the existing Medicare funding for Idaho hospitals that provide emergency care.

Beyond the approximately $1 billion per year in Medicare funding at risk to Idaho's hospitals, *see* Dkt. 17-10 ¶ 6, any hospitals that are excluded from Medicare would not be able to bill for Medicare patients—putting a substantial number of Idahoans at risk of losing access to (or even be able to afford) medical care. Thus, the consequence to Idaho is to either surrender its policy choice regulating abortion, or hospitals and citizenry to lose Medicare benefits on which they rely. These potentially devasting consequences leave Idaho without a legitimate choice.

This is not a situation where Congress uses its taxing and spending authority to merely encourage or incentivize state regulatory and policy choices. *See New York v. United States*, 505 U.S. 144, 166 (1992). Rather, the federal government is using a pre-*Dobbs* legislative scheme to abolish the State's policy choices post-*Dobbs* in the emergency medical care setting. Its position is that hospitals that accept millions in Medicare funds are exempt from State law. The coercive nature of this is unmistakable, not just to the providers and hospitals, but to the State, which is coerced with threats directly to its budget or indirectly to the ability of its citizens to obtain healthcare.

IX. The Court erred in concluding that this is an as-applied challenge.

The Court said the United States "has mounted a textbook, as-applied challenge." Order 17. Yet, the United States sought to have the Court issue injunctive relief regarding all instances where there is EMTALA treatment, not a particular circumstance involving one mother and one set of facts, and that would allow such relief to follow through to non-party hospitals, physicians, and pregnant women in Idaho. What the Court has before it is a facial challenge that must be decided on the facial standard.

Imagine a plaintiff concerned about a referendum petition and the state's public records act (PRA). Imagine the complaint asserts the PRA violates the first amendment as applied to referendum petitions—obviously the PRA's application to other documents is unchallenged. According to this Court's analysis, this is a "textbook, as-applied challenge." But the Court would be wrong. *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), explains that this type of challenge is indeed a facial challenge, despite having characteristics of an as-applied challenge.

CONCLUSION

The Court should grant the motion for reconsideration, vacate the preliminary injunction, and on reconsideration deny the United States' motion for a preliminary injunction.

DATED this 21st day of September, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Brian V. Church*
STEVEN L. OLSEN
MEGAN A. LARRONDO
BRIAN V. CHURCH
Deputy Attorneys General

CLAY R. SMITH
JOAN E. CALLAHAN
Special Deputy Attorneys General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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

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

Attorney for Amici States California, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland,

DANIEL W. BOWER
Morris Bower & Haws PLLC
dbower@morrisbowerhaws.com

MONTE NEIL STEWART
Attorney at Law
monteneilstewart@gmail.com

Attorneys for Intervenors-Defendants

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

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

JACOB M. ROTH
Jones Day
jroth@jonesday.com

AMANDA K. RICE
Jones Day
arice@jonesday.com

CHARLOTTE H. TAYLOR

Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Washington, D.C.

Jones Day
ctaylor@jonesday.com

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

SHANNON ROSE SELDEN
Debevoise & Plimpton LLP
srselden@debevoise.com

ADAM B. AUKLAND-PECK
Debevoise & Plimpton LLP
Aaukland-peck@debevoise.com

LEAH S. MARTIN
Debevoise & Plimpton LLP
lmartin@debevoise.com

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

Brian V. Church
BRIAN V. CHURCH
Deputy Attorney General

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief, Civil Litigation Division

MEGAN A. LARRONDO, ISB #10597
BRIAN V. CHURCH, ISB #9391
ALAN W. FOUTZ, ISB #11533
INGRID C. BATEY, ISB #10022
Deputy Attorneys General
CLAY R. SMITH, ISB #6385
Special Deputy Attorney General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
brian.church@ag.idaho.gov

JOAN E. CALLAHAN, ISB #9241
NAYLOR & HALES, P.C.
Special Deputy Attorney General
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Telephone: (208) 383-9511
Facsimile: (208) 383-9516
joan@naylorhales.com

Attorneys for Defendant State of Idaho

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329 **STATE OF IDAHO'S MOTION TO RECONSIDER PRELIMINARY INJUNCTION (Dkt. 95)**

The State of Idaho moves the Court to reconsider its preliminary injunction and Memorandum Decision and Order, Dkt. 95, vacate the preliminary injunction, and on reconsideration deny the United States' Motion for a Preliminary Injunction, Dkt. 17. This motion for reconsideration is brought under Federal Rule of Civil Procedure 59(e). *See Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1123-24 (9th Cir. 2005). A Memorandum in Support

of State of Idaho's Motion to Reconsider Preliminary Injunction (Dkt. 95) accompanies this motion.

DATED this 21st day of September, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Brian V. Church*
STEVEN L. OLSEN
MEGAN A. LARRONDO
BRIAN V. CHURCH
Deputy Attorneys General

CLAY R. SMITH
JOAN E. CALLAHAN
Special Deputy Attorneys General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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

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

Attorney for Amici States

DANIEL W. BOWER
Morris Bower & Haws PLLC
dbower@morrisbowerhaws.com

MONTE NEIL STEWART
Attorney at Law
monteneilstewart@gmail.com

Attorneys for Intervenors-Defendants

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

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

JACOB M. ROTH
Jones Day
jroth@jonesday.com

AMANDA K. RICE
Jones Day
arice@jonesday.com

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

CHARLOTTE H. TAYLOR
Jones Day
ctaylor@jonesday.com

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

SHANNON ROSE SELDEN
Debevoise & Plimpton LLP
srselden@debevoise.com

ADAM B. AUKLAND-PECK
Debevoise & Plimpton LLP
Aaukland-peck@debevoise.com

LEAH S. MARTIN
Debevoise & Plimpton LLP
lmartin@debevoise.com

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

/s/ Brian V. Church
BRIAN V. CHURCH
Deputy Attorney General

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief, Civil Litigation Division

MEGAN A. LARRONDO, ISB #10597
BRIAN V. CHURCH, ISB #9391
ALAN W. FOUTZ, ISB #11533
INGRID C. BATEY, ISB #10022
Deputy Attorneys General
CLAY R. SMITH, ISB #6385
Special Deputy Attorney General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
brian.church@ag.idaho.gov

JOAN E. CALLAHAN, ISB #9241
NAYLOR & HALES, P.C.
Special Deputy Attorney General
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Telephone No. (208) 383-9511
Facsimile No. (208) 383-9516
joan@naylorhales.com

Attorneys for Defendant State of Idaho

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329 **STATE OF IDAHO'S PARTIAL NON-OPPOSITION TO UNITED STATES' MOTION TO EXTEND BRIEFING SCHEDULE REGARDING MOTIONS FOR RECONSIDERATION (Dkt. 99)**

The State of Idaho files this partial non-opposition to the United States' Motion to Extend Briefing Schedule Regarding Motions for Reconsideration. The State does not oppose the United States' request to respond to the Idaho Legislature's motion for reconsideration (Dkt. 97) at the same time the United States files its response to the State of Idaho's forthcoming motion for

reconsideration, which will be filed on or before September 21, 2022. The State of Idaho understands such response would be filed in accordance with the timing of Local Civil Rule 7.1.

However, with respect to the United States' request that it be granted 40 pages to provide a combined response, the State of Idaho suggests that the Court defer ruling on this request or deny this request but grant the United States leave to reassert such request. The State of Idaho suggests the better approach would be for the United States to review both the Idaho Legislature's and State of Idaho's motions for reconsideration, and then reassert how many pages it believes it needs after seeing the motions. The State anticipates overlap between the arguments advanced by the State and those advanced by the Legislature.

DATED this 16th day of September, 2022.

OFFICE OF THE ATTORNEY GENERAL

By: */s/ Brian V. Church*
BRIAN V. CHURCH
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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

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

Attorney for Amici States California, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland,

DANIEL W. BOWER
Morris Bower & Haws PLLC
dbower@morrisbowerhaws.com

MONTE NEIL STEWART
Attorney at Law
monteneilstewart@gmail.com

Attorneys for Intervenors-Defendants

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

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

JACOB M. ROTH
Jones Day
jroth@jonesday.com

AMANDA K. RICE
Jones Day
arice@jonesday.com

Attorneys for Amici Curiae

Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Washington, D.C.

The American Hospital Association and the Association of American Medical Colleges

SHANNON ROSE SELDEN
Debevoise & Plimpton LLP
srselden@debevoise.com

ADAM B. AUKLAND-PECK
Debevoise & Plimpton LLP
Aaukland-peck@debevoise.com

LEAH S. MARTIN
Debevoise & Plimpton LLP
lmartin@debevoise.com

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

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participant via email:

CHARLOTTE H. TAYLOR
Jones Day
ctaylor@jonesday.com

/s/ Brian V. Church
BRIAN V. CHURCH
Deputy Attorney General

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant, and SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE, Intervenor-Defendants.	Case No. 1:22-cv-00329-BLW

IDAHO LEGISLATURE'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER GRANTING 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

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I. This motion is procedurally proper and satisfies the standard of review.

This motion is procedurally proper.

> When a district court enters an order granting preliminary injunctive relief, parties who take exception to its terms must either file a motion for reconsideration in the district court within ten days under Rule 59(e) [now 28 days], bring an interlocutory appeal from that order under 28 U.S.C.A. § 1292(a)(1), or wait until the preliminary injunction becomes final and then appeal.

Favia v. Indiana Univ. of Pennsylvania, 7 F.3d 332, 337–38 (3d Cir. 1993). Motions for reconsideration of orders regarding preliminary injunctions are standard practice in the Ninth Circuit,[1] *see, e.g., Katie A., ex rel. Ludin v. Los Angeles Cnty.*, 481 F.3d 1150, 1152 (9th Cir. 2007) ("We have jurisdiction to review the district court's order granting the preliminary injunction and the court's denial of the motion for reconsideration under 28 U.S.C. § 1292(a)(1)."). A motion under Rule 59(e) is timely if "filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). This motion is timely since it follows less than 28 days after the August 24, 2022 entry of the Idaho Order.

This motion satisfies the standard of review. Ninth Circuit precedent holds that "[r]econsideration is appropriate if the district court . . . committed clear error or the initial decision was manifestly unjust . . . ." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "[A] trial court has discretion to reconsider its prior, non-final decisions. '[T]he major grounds that justify reconsideration involve . . . the need to correct a clear error or prevent manifest injustice.'" *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369

[1] Here are some examples from just the past ten months: *Hayes v. Oregon*, No. 1:20-CV-01332-CL, 2022 WL 488069, at *1 (D. Or. Feb. 17, 2022) (reviewing a motion to reconsider denial of a preliminary injunction, stated that a "district court is permitted to reconsider and amend a previous order pursuant to Federal Rule of Civil Procedure 59(e)."); *Wholesaler Equity Dev. Corp. v. Bargreen*, No. C20-1095RSM, 2021 WL 5648099 (W.D. Wash. Dec. 1, 2021), appeal dismissed, No. 21-36010, 2021 WL 7443767 (9th Cir. Dec. 17, 2021) (same).

n.5 (9th Cir. 1989).[2] The following sections demonstrate that reconsideration and alteration of the Idaho Order are necessary to correct a clear error and prevent manifest injustice.

II. The Idaho Order clearly erred by ignoring Congress's language defining the scope of EMTALA and instead using the Administration's materially different and misleading language.

In the August 22 hearing, Mr. Stewart spoke of Idaho having drawn its line regulating abortion. Transcript of August 22, 2022 Hearing ("Transcript") at 59. Mr. Netter in response said that the United States had established a different "standard," a different line, protecting abortions in the context of emergency medical conditions. *Id*. at 69. His point was that where Idaho's line went beyond the United States' line, there was a conflict creating a Supremacy Clause issue that must be resolved in favor of the United States by issuing an injunction prohibiting State action in the area of conflict defined by the two lines. *Id*.

Mr. Netter, however, misspoke. The United States has not drawn a line, it has drawn two lines. Congress drew one line, and the current administration ("Administration"), through its Department of Justice ("DOJ") and its Department of Health and Human Services ("DHHS"), has (since and in response to June 24) drawn a different line. A materially different line.

Congress's line and the Administration's newly minted line diverge at subpart (i) of EMTALA's definition of "emergency medical condition." 42 U.S.C. § 1395dd(e)(1)(A) says in relevant part:

> (1) The term "emergency medical condition" means—(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—(i) 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) (emphasis added).

As this language reveals, Congress drew its line to protect *both* the mother *and* the unborn child in an emergency medical situation. By contrast, the Administration draws its line to eliminate all protection for the unborn child in such situations. It did so by a simple expedient—it silently erased "or her unborn child" from all DOJ filings here (including in its Proposed Order, Dkt. 17-2, which this Court used word-for-word in the Idaho Order at 38-39) and from all DHHS Guidance and other communications.

In the August 22 hearing, this was the Legislature's thrice-iterated "most important point." Transcript at 60, 62. The Government's Proposed Order, with its inclusion of the altered subpart (i) language, was seeking to enjoin State action where there was *no* conflict between federal law and state law. This matters because this Court's "authority extends to the boundary of the conflict and no further. You can enjoin 622 to the extent of a conflict …. But that's the limit of your authority to enjoin enforcement and operation of 622." *Id*. at 61. Moreover, and distressingly, the DOJ was erasing Congressional language expressly written to protect the health of preborn children in order to expand the injunction's scope and, thereby, greatly increase the risk of death for such children. That purpose squarely contradicts EMTALA's clear language and Congress's evident intent that "the health of . . . the unborn child" not be put "in serious jeopardy." 42 U.S.C. § 1395dd(c)(2)(A).

Mr. Stewart went on to note correctly that this alteration, this erasure, of Congressional language was done in an effort to fulfill at least in part the Administration's "political promise to push back against *Dobbs*." *Id*. at 62. That political promise was made so publicly and so soon after *Dobbs* that everyone in the courtroom knew what Mr. Stewart was referring to.[3] Soon after *Dobbs*

[3] Describing the Supreme Court's decision in *Dobbs* as the cause of a nationwide "health crisis," President Biden responded with an executive order directing HHS to "consider[ ] updates to

overruled the *Roe/Casey* abortion regime and returned to the respective States and their people their constitutional authority to regulate abortion, the Administration publicly announced that the federal executive branch, across all its departments, would use whatever means it could grasp in an effort both to thwart the *Dobbs* decision and to attempt to resurrect to the greatest extent possible the nationwide *Roe/Casey* abortion regime. That was the political promise, with this civil action being one effort to fulfill it—or, more accurately, to create the appearance of fulfilling it. [4]

During the August 22 hearing, the Legislature's counsel sought to share not just the uncensored EMTALA language but also a "blue-line" of the Government's Proposed Order that limited its scope to the scope of the real conflict (defined by Congressional language), rather than the scope of the manufactured conflict (defined by the altered subpart (i) language). Transcript at 62-63. The Court declined to look at the "blue-line," suggesting it could be filed post-hearing. *Id.* at 65. The Legislature did file it following the hearing, later that same day. Dkt. 93.

Then on August 23, the United States District Court for the Northern District of Texas issued its Decision and Order making the same thrice-iterated "most important" point. *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022) ("Texas Decision"). This Court had the Texas Decision in hand on August 24, Dkt. 94-1, although the later-filed Idaho Order makes no reference to it.

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current guidance on obligations specific to emergency conditions and stabilizing care under [EMTALA]." Exec. Order 14076, 87 Fed. Reg. 42053, 42053 (July 13, 2022). HHS promptly obliged. A few days later, it issued "clarifying guidance" under EMTALA, along with Secretary Becerra's statement that the statute "preempts state law restricting access to abortion in emergency situations." https://www.hhs.gov/about/news/2022/ 07/11/following-president-bidens-executive-order-protect-access-reproductive-health-care-hhs-announces-guidance-clarify-that-emergency-medical-care-includes-abortion-services.html. This case is nothing more or less than Administration policy operationalized as high-stakes litigation against the State of Idaho.

[4] We say "create the appearance" because, according to our research, at its broadest the Government's case affects a category of abortions that, under the *Roe/Casey* regime, accounted for less than 2% of all Idaho abortions.

Regarding the Legislature's "most important" point, the Texas Decision first detailed the context and making of the political promise and the scope of efforts to fulfill it, including the DHHS Guidance, *id.* at 6–9, and this Idaho civil action, *id.* at 37. (All Texas Decision page references are to the version filed in this civil action as Document 94-1.)

That Decision then addresses the uncensored language of subpart (i), which created "EMTALA's equal obligations to the pregnant woman and her unborn child" but also "create[d] a potential conflict in duties that [EMTALA] does not resolve," *id*. at 42, specifically, what do doctors do "where emergency medical conditions threaten the health of both the pregnant woman and the unborn child"? *Id*. at 43.

After thorough analysis of the relevant statutory and case law bearing on "the obligations of doctors in cases of conflict between the health of a pregnant woman and her unborn child," the Texas court concluded that "there is no direct conflict between EMTALA and state laws that attempt to address that circumstance." *Id.* at 44. There is no "impossibility" preemption, *id.* at 45–46, and no "obstacle" preemption, *id.* at 46–49. Because EMTALA simply "does not resolve how stabilizing treatments must be provided when a doctor's duties to a pregnant woman and her unborn child possibly conflict," *id.* at 49, "EMTALA leaves [that resolution] to the states." *Id.*

The Texas Decision utterly rejects the government's attempt to use EMTALA as a wedge to leverage federal control over state abortion laws. That Decision repudiates the government's theory of preemption: since "EMTALA leaves unresolved the conflict between emergency medical conditions that threaten the health of both the pregnant woman and the unborn child—and therefore . . . does not preempt state law filling that void—it becomes clear the Guidance [and the identically worded Proposed Order] goes beyond the language of" EMTALA. *Id*. This is because the Administration's "erasure" scheme requires (DHHS's Guidance) or allows (DOJ's Proposed

Order) "physicians to perform abortions when they believe that an abortion would resolve a pregnant woman's emergency medical condition irrespective of the unborn child's health and contrary state law." *Id*. Thus, the Administration's scheme of omitting statutory language specifically requiring medical care to protect a preborn child "stands contrary to" EMTALA. *Id*. at 50.

The Texas Decision concludes with well-deserved criticism of the Administration's "erasure" scheme—its "conspicuous omission of the reference to the health of the 'unborn child.'" *Id*. Rightly, the Decision found the Administration's distortion of plain statutory language indefensible—especially as a political maneuver to repurpose EMTALA as a kind of *Roe/Casey* Restoration Act. *Id.* at 49–52. Because EMTALA "expresses explicit concern for the unborn child," *id*. at 52, "[t]his concern is critical to understanding how the statute [EMTALA] approaches abortion—if at all." *Id*.

> In such a case, the Court [along with, by this point, every other good-faith reader] finds it difficult to square a statute that instructs physicians to provide care for both the pregnant woman and the unborn child with [preliminary injunction language] 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.

By adopting wholesale the Government's Proposed Order with its altered subpart (i) language, the Idaho Order at 38-39 stepped beyond the bounds of EMTALA and thereby stepped beyond the bounds of any real conflict between federal law (Congress's law, not the Administration's clumsy counterfeit) and Idaho's 622 Statute. That in turn means that the Idaho Order at 38-39 steps beyond this Court's lawful authority. *See* Transcript at 61 (a district court's "authority extends to the boundary of the conflict and no further"). The United States Supreme Court has made the same point, forcefully:

> Simply put, where enforcement of a law would conflict with the Constitution, a court has authority under the Supremacy Clause to enjoin enforcement, but a court *cannot*, consistent with separation of powers, enjoin enforcement of a statute where enforcement would be lawful.

Borden v. United States, 141 S. Ct. 1817, 1836 (2021) (emphasis added).

This binding law means that a preliminary injunction should not affect the enforcement of the 622 Statute except insofar as EMTALA requires it. Therein lies the rub. By crediting the Government's misinterpretation of EMTALA—built on a deliberate omission of language requiring the protection of a pregnant woman's unborn child—this Court's preliminary injunction purports to enjoin the 622 Statute where the language of EMTALA does not apply.

We, therefore, urge the Court to amend pages 38 and 39 of the Idaho Order in keeping with the "blue-line" submitted by the Legislature. That "blue-line" document takes out the Government's altered subpart (i) language, while leaving in the subpart (ii) and subpart (iii) language. Idaho's 622 Statute on its face (although not in application) is different from the Texas statute addressed in the Texas Decision relative to those two subparts.

Modifying the preliminary injunction in this way is literally a life-and-death matter. Some of Idaho's preborn children may well die as a consequence of the Idaho Order as now written—children whose lives Idaho's 622 Statute protects properly and constitutionally. If the 622 Statute is to be enjoined at all, the Idaho Order should conform with the actual language of EMTALA—not a version partially erased to serve the Administration's political purposes. Remember that EMTALA clearly requires that the health of the unborn child not be put "in serious jeopardy," 42 U.S.C. § 1395dd(c)(2)(A), let alone in that ultimate jeopardy created by the Administration's "erasure" scheme.

III. Serious legal and constitutional errors render the preliminary injunction clearly erroneous.

A motion for reconsideration should be granted when the judgment rests on a clear error of law. *See Harrington v. City of Chicago*, 433 F.3d 542 (7th Cir. 2006) (altering or amending a judgment is permitted when there has been a manifest error of law). Here, the decision granting a preliminary injunction to the United States relies on a misstatement of Idaho law and an omission of federal law. Even more critically, the decision does not address multiple legal and constitutional errors that the State and Legislature brought to the Court's attention. For those reasons, the preliminary injunction should be vacated.

A. The Decision Contains Clear Errors of Law Under State and Federal Statutes.

The Court's analysis relies on a misstatement of Idaho law. When explaining why the affirmative defenses in Idaho Code § 18-622 did not "cure" the impossibility of complying with both Idaho law and EMTALA, the district court criticized those defenses. Decision at *8. "The affirmative defense admits that the physician committed a crime but asserts that the crime was justified and is therefore legally blameless. And it can only be raised after the physician has already faced indictment, arrest, pretrial detention, and trial for every abortion they perform." *Id.* (citation omitted). Not so. Idaho has not adopted the draconian scheme that the Court has described. Section 622 plainly says that the life of the mother, rape, and incest are "affirmative defense[s] *to prosecution*." Idaho Code § 18-622(3) (emphasis added). No physician faces the gantlet of criminal prosecution, so long as he or she performs an abortion under the circumstances provided for by statute. Because the Court's analysis of the central issue of preemption turns on an incorrect rendition of section 622, the preliminary injunction stands on a clear error of law.

The decision likewise goes awry by neglecting to address a federal statute that expressly limits EMTALA's preemptive force, even though the decision squarely relies on preemption as

the reason for enjoining the 622 Statute. *See* Decision at *18–26 (discussing impossibility and obstacle preemption). That provision says that "[n]othing in *this subchapter* shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided … or to exercise any supervision or control over the administration or operation of any such institution, agency, or person." 42 U.S.C. § 1395 (emphasis added). This directive *not* to preempt state law is controlling because EMTALA falls within subchapter XVIII of the Social Security Act. Since the Court's analysis did not address section 1395, or its effect on the government's preemption claims, that too is a clear error of law that calls for the preliminary injunction to be vacated.

B. Granting a Preliminary Injunction for the United States Commits Clear Errors of Constitutional Law.

Mistakes of statutory interpretation are surely enough to warrant reconsideration. But it is the multiple constitutional errors raised by the case brought by the United States that make reconsideration especially urgent. Although the State and the Legislature presented serious constitutional objections to the Government's case, the Court declined to address them. The State argued that the government's interpretation of EMTALA renders the statute "invalid as coercive spending clause legislation." *United States v. State of Idaho*, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *6 (D. Idaho Aug. 24, 2022) (Decision). But that objection was brushed aside as "not sufficiently developed," to which the Court added the inapplicable rule that "courts should [not] anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.* (quotation omitted). For its part, the Legislature submitted substantial constitutional objections in a memorandum attached to its Motion for Leave to File Legal Arguments, but the Court denied the Motion and declined to address those objections. Docket Entry Order, Doc. 75. These rulings

effectively denied the State and the Legislature any hearing on their constitutional objections to the complaint. We respectfully ask the Court to consider those objections now.

1. As read by the government, EMTALA violates the major questions doctrine.

Under the major questions 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 this rule applies, "something more than a merely plausible textual basis for the agency action is necessary." *Id.* at 2609. Requiring an unusually clear delegation of congressional authority over a matter of national significance reflects the nondelegation doctrine, which preserves the separation of powers by ensuring that "any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring). 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." *W. Va. v. EPA*, 142 S. Ct. 2587, 2609 (2022). Three times in the past year alone, the Supreme Court has invoked the major questions doctrine as sufficient reason to declare certain Administration initiatives unconstitutional. *Id.* 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).

The Idaho Order sanctions a violation of the major questions doctrine by deferring to an executive branch interpretation of EMTALA that inaugurates unprecedented authority over a matter of grave political importance, without express congressional approval. The United States

asserts that federal law precludes Idaho from regulating abortion insofar as it qualifies (in the government's view) as needed "stabilizing treatment" for a pregnant woman at a federally funded emergency center. Decision at *2. But exerting federal control over state abortion law is indisputably a matter of "vast … political significance." *Utility Air Regulatory Group*, 573 U.S. at 324. It takes "more than a merely plausible textual basis" to justify a federal assault on the constitutional authority that Idaho possesses under *Dobbs*. *Id.* at 2609. The United States must show that Congress has spoken with unusual clarity in requiring emergency rooms to perform abortion procedures even when unnecessary to save a mother's life. And that the United States has failed to do. EMTALA's glancing reference to "[n]ecessary stabilizing treatment" hardly speaks with the requisite clarity to the issue of abortion procedures, given the prospect of upending Idaho law on a question of enormous public significance. 42 U.S.C. § 1395dd(b). Like the CDC's eviction moratorium, the government's weaponization of EMTALA grants the government "a breathtaking amount of authority," *Ala. Assoc. of Realtors*, 141 S. Ct. at 2489, by imposing a nationwide abortion mandate through an unreasonable interpretation of a narrow statute.

2. The Supremacy Clause does not give the United States an implied right of action.

As described more fully in an amicus brief filed by 17 states, the Supremacy Clause does not contain the implied right of action on which this case rests. In another case against the State of Idaho, the U.S. Supreme Court held that providers of residential habilitation services could not bring a suit under the Supremacy Clause challenging the disparity between Idaho's Medicaid reimbursement rates and the supposed requirements of the Medicaid Act. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015). Such a suit was barred, the Court explained, because the Supremacy Clause "creates a rule of decision," but not "any federal rights" or "a cause of action." *Id.* at 324–25. Rather, the Clause "instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what

circumstances they may do so." *Id.* at 325. *Armstrong* thus directly forecloses the United States from bringing a lawsuit against the State of Idaho directly under the Supremacy Clause.

Its decision highlights this Court's view that "the Supremacy Clause says state law must yield to federal law when it's impossible to comply with both. *And that's all this case is about*." Decision at *1 (emphasis added). But the Court does not grapple with how *Armstrong* precludes this case. The United States is not "an individual" seeking an injunction to prevent a state regulation from overriding federal immunity. *Id.* at *6 (quoting *Armstrong*, 575 U.S. at 326). Nor does it matter that the United States is "challenging the validity" of Idaho law. *Id. Armstrong* stands for the broad principle that the Supremacy Clause nowhere "give[s] affected parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States." 575 U.S. at 325. On that point, the United States stands in no better position than a private party. Since *Armstrong* bars exactly the kind of claim brought by the Government here, the preliminary injunction rests on another clear error of law.

3. The Preliminary Injunction Exceeds the Court's Powers as an Inferior Court Under Article III.

By issuing its preliminary injunction, the Court has exceeded its power as an inferior tribunal. Article III vests "the judicial power of the United States" in "one supreme Court." U.S. Const. art. III, § 1. The resulting judicial hierarchy makes U.S. Supreme Court precedents binding on this Court. *Jean v. Nelson*, 472 U.S. 846 (1985) ("this Court's judgments are precedents binding on the lower courts"). Only weeks ago, the U.S. Supreme Court issued a historic decision overruling 50 years of its own precedents holding that abortion is a federal constitutional right. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2284 (2022). *Dobbs* specifically held that eliminating a federal right to abortion would result in the return of regulatory authority concerning abortion "to the people and their elected representatives." *Id.* Despite *Dobbs*, the Idaho

Order blocks the State of Idaho from exercising that authority by enjoining the 622 Statute. Since this Court's order does not explain how a statutory interpretation can impede the transfer of constitutional authority pronounced in *Dobbs*, that decision is in error.

4. The Court's Decision sanctions an interpretation of EMTALA that exceeds Congress's authority under the Spending Clause.

The State fairly briefed the Court on its concern that the Government's interpretation of EMTALA violates the Spending Clause. That is the Clause granting Congress the power "to pay the Debts and provide for the … general Welfare of the United States." U.S. Const. art. I, § 8. To guard against allowing that power to obliterate the fundamental distinction between federal and state powers, the Constitution places "limits on Congress's power … to secure state compliance with federal objectives." *NFIB v. Sebelius*, 567 U.S. 519, 576 (2012). For instance, when "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." *Id.* at 580. Federal strings may attach to federal dollars, but "the States must have a genuine choice whether to accept the offer." *Id.* at 588. Also, retroactive conditions on federal funding are disallowed. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) ("Though Congress' power to legislate under the spending power is broad, it does not include surprising the States with post-acceptance or 'retroactive' conditions."). Both limits are transgressed here.

First, the United States threatens to withhold all Medicare funding unless Idaho complies with the Government's novel abortion mandate under EMTALA. That threat is evident from an insistence that "a *hospital* participating in Medicare must comply with EMTALA as a condition of receiving federal funds" and that "*hospitals* enter into written agreements with the [HHS] Secretary confirming they will comply with EMTALA." Mem. in Supp. of Mot. for a Prelim. Inj., United States v. State of Idaho, No. 1:22-cv-329-BLW, at 5 (S.D. Idaho Aug. 8, 2022) ("Mem.")

(emphasis added). The United States insists that EMTALA imposes duties for "all patients, not just for Medicare beneficiaries." *Id.* at 19. This expansive reading of EMTALA leads to a sweeping outcome. Because Idaho Code § 18-622 governs all abortions performed in the state, the Government says, state law will "disrupt the [Medicare] program and deprive the United States of the benefit of its bargain by prohibiting Idaho hospitals from performing EMTALA-mandated services, notwithstanding that hospitals' receipt of Medicare funds is conditioned on them doing so." *Id.* On the Government's view, EMTALA requires Idaho hospitals to perform abortion procedures whenever the Government says so, and noncompliance may result in the loss of all Medicare funds.

Those funds are considerable. By the Government's own estimate, between 2018–20, Idaho's hospitals received $3.4 billion in Medicare funds and the state's 39 emergency centers received $74 million in federal funding—all of which was "conditioned on compliance with EMTALA." *Id.* at 6. Framed in these terms, the threatened loss of federal funding is not limited to support for abortion-related emergency care or abortion-related emergency care for Medicare beneficiaries. As the Government would have it, compliance with EMTALA embraces all Medicare-funded emergency centers and all patients—not only Medicare recipients. *Id.* at 6. Its memorandum lays out the case for denying Idaho hospitals funding under the Medicare program, solely because of its dispute with perceived noncompliance as to a single medical procedure governed by Idaho law and available at only 39 of 52 Medicare-certified hospitals. *Id*.

Threatening to withhold all Medicare-related funding for hospitals in Idaho unless emergency centers comply with an expansive interpretation of EMTALA exceeds the Government's authority under the Spending Clause. Consider a parallel threat in the original Affordable Care Act. There, states complained that "Congress [was] coercing the States to adopt

the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it." *NFIB*, 567 U.S. at 575. Agreeing with that objection, the Court held that this provision of ACA amounted to "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 582 (footnote omitted). Likewise here. The Government's threat to withhold all federal funding to any emergency center found to violate EMTALA is not a policy nudge—but "a gun to the head." *NFIB*, 567 U.S. at 581.

Second, the United States has sprung this abortion mandate under EMTALA on Idaho long after it agreed to other conditions of participating in Medicare. Trying to impose its abortion mandate on Idaho hospitals retroactively is an independent reason for concluding that the Government is exceeding its powers under the Spending Clause. *Pennhurst*, 451 U.S. at 25.

5. *The Preliminary Injunction Trenches on Idaho's Reserved Power Under the Tenth Amendment.*

The preliminary injunction violates the State of Idaho's reserved power to regulate abortion. *Dobbs* held that that authority now belongs "to the people and their elected representatives." 142 S. Ct. at 2284. There can be no reasonable dispute that Idaho possesses the authority to regulate abortion as a matter of federal constitutional law. But the preliminary injunction will thwart the return of authority prescribed by *Dobbs*. Specifically, the injunction prevents Idaho from carrying out sections 622(2) and (3), to the extent that those provisions collide with provisions under EMTALA that protect a pregnant woman's health from "serious jeopardy," pose a "serious impairment to [her] bodily functions," or threaten to cause a "serious dysfunction of any bodily organ or part." Decision at *15 (quoting 42 U.S.C. §§ 1395dd(e)(1)(A)(i)-(iii)). This order overrides the political, practical, and moral judgment of Idaho lawmakers to protect both mother *and* child by permitting abortion when necessary to save the mother's life and to allow

abortion to terminate a pregnancy resulting from rape or incest, but not otherwise. Idaho Code § 18-622.

Even if the United States could point to unambiguous statutory authority for its attempted blockade of Idaho law, EMTALA is a garden-variety statute that must give way to the Constitution insofar as they conflict. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (the constitution controls any legislative act repugnant to it."). Under that principle, the Supreme Court's final judgment in *Dobbs* must prevail over conflicting federal statutes. While EMTALA remains valid to the extent that it prescribes certain forms of medical care by institutions participating in Medicare and Medicaid, it cannot be read as the Idaho Order says. The people of Idaho enjoy constitutional authority to govern themselves with respect to abortion, and no federal statute, however overread by an Administration committed to countering *Dobbs*, can lawfully diminish that authority.

CONCLUSION

For all these reasons, the Court should either modify its August 24 Order to reflect the blue-line document submitted by the Legislature or vacate that Order in its entirety.

Dated this 7th day of September, 2022.

/s/ Daniel W. Bower
Daniel W. Bower
MORRIS BOWER & HAWS, PLLC

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2022, 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

Brian V Church
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Office of the Attorney General
brian.church@ag.idaho.gov
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov

JOAN E. CALLAHAN, ISB #9241
NAYLOR & HALES, P.C.
Special Deputy Attorney General
joan@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, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Washington, D.C.

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

JACOB M. ROTH
AMANDA K. RICE
Jones Day
jroth@jonesday.com
arice@jonesday.com

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

SHANNON ROSE SELDEN
Debevoise & Plimpton LLP
srselden@debevoise.com

ADAM B. AUKLAND-PECK
Debevoise & Plimpton LLP
Aaukland-peck@debevoise.com

LEAH S. MARTIN
Debevoise & Plimpton LLP
lmartin@debevoise.com

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

I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participant via email:

CHARLOTTE H. TAYLOR
Jones Day
ctaylor@jonesday.com

/s/ Daniel W. Bower
Daniel W. Bower

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant,

and

SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE,

Intervenor-Defendants.

Case No. 1:22-cv-00329-BLW

IDAHO LEGISLATURE'S MOTION FOR RECONSIDERATION OF ORDER GRANTING 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

Intervenor-Defendants Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively "Legislature") respectfully move this Court to reconsider its August 24, 2022 Decision and Order, Dkt. 95 ("Idaho Order"). The Court should enter, in the place of the "Order" appearing at pages 38–39, the language appearing in Exhibit 2 to the Idaho Legislature's Objection to the Government's Proposed Order, Dkt. 93, or enter a new order vacating the Idaho Order and denying the Government's Motion for Preliminary Injunction, Dkt. 17.

This motion is supported by the Memorandum filed contemporaneously herewith, with the motion's first request being specifically supported by that Memorandum's Section II and the motion's second request being specifically supported by that Memorandum's Section III.

Dated this 7th day of September, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2022, 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

Brian V Church
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Office of the Attorney General
brian.church@ag.idaho.gov
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov

JOAN E. CALLAHAN, ISB #9241
NAYLOR & HALES, P.C.
Special Deputy Attorney General
joan@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, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Washington, D.C.

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

JACOB M. ROTH
AMANDA K. RICE
Jones Day
jroth@jonesday.com
arice@jonesday.com

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

SHANNON ROSE SELDEN
Debevoise & Plimpton LLP
srselden@debevoise.com

ADAM B. AUKLAND-PECK
Debevoise & Plimpton LLP
Aaukland-peck@debevoise.com

LEAH S. MARTIN
Debevoise & Plimpton LLP
lmartin@debevoise.com

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

I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participant via email:

CHARLOTTE H. TAYLOR
Jones Day
ctaylor@jonesday.com

/s/ Daniel W. Bower
Daniel W. Bower

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 MEMORANDUM DECISION AND ORDER

INTRODUCTION

Pregnant women in Idaho routinely arrive at emergency rooms experiencing severe complications. The patient might be spiking a fever, experiencing uterine cramping and chills, contractions, shortness of breath, or significant vaginal bleeding. The ER physician may diagnose her with, among other possibilities, traumatic placental abruption, preeclampsia, or a preterm premature rupture of the membranes. In those situations, the physician may be called upon to make complex, difficult decisions in a fast-moving, chaotic environment. She may conclude that the only way to prevent serious harm to the patient or save her life is to terminate the pregnancy—a devastating result for the doctor and the patient.

So the job is difficult enough as it is. But once Idaho Code § 18-622 goes into effect, the physician may well find herself facing the impossible task of

attempting to simultaneously comply with both federal and state law. A decades-old federal law known as the Emergency Medical Treatment and Labor Act (EMTALA) requires that ER physicians at hospitals receiving Medicare funds offer stabilizing treatment to patients who arrive with emergency medical conditions. But when the stabilizing treatment is an abortion, offering that care is a crime under Idaho Code § 18-622—which bans *all* abortions. If the physician provides the abortion, she faces indictment, arrest, pretrial detention, loss of her medical license, a trial on felony charges, and at least two years in prison. Yet if the physician does not perform the abortion, the pregnant patient faces grave risks to her health—such as severe sepsis requiring limb amputation, uncontrollable uterine hemorrhage requiring hysterectomy, kidney failure requiring lifelong dialysis, hypoxic brain injury, or even death. And this woman, if she lives, potentially may have to live the remainder of her life with significant disabilities and chronic medical conditions as a result of her pregnancy complication. All because Idaho law prohibited the physician from performing the abortion.

Granted, the Idaho statute offers the physician the cold comfort of a narrow affirmative defense to avoid conviction. But only if she convinces a jury that, in her good faith medical judgment, performing the abortion was "necessary to prevent the death of the pregnant woman" can she possibly avoid conviction. Even then, there is no certainty a jury will acquit. And the physician cannot enjoy the

benefit of this affirmative defense if she performed the abortion merely to prevent serious harm to the patient, rather than to save her life.

Back to the pregnant patient in the emergency department. The doctor believes her EMTALA obligations require her to offer that abortion right now. But she also knows that all abortions are banned in Idaho. She thus finds herself on the horns of a dilemma. Which law should she violate?

Fortunately, the drafters of our Constitution had the wisdom to provide a clear answer in Article VI, Paragraph 2 of the Constitution—the Supremacy Clause. At its core, the Supremacy Clause says state law must yield to federal law when it's impossible to comply with both. And that's all this case is about. It's not about the bygone constitutional right to an abortion. This Court is not grappling with that larger, more profound question. Rather, the Court is called upon to address a far more modest issue—whether Idaho's criminal abortion statute conflicts with a small but important corner of federal legislation. It does.

As such, the United States has shown it will likely succeed on the merits. Given that—and for the reasons discussed in more detail below—the Court has determined it should preserve the status quo while the parties litigate this matter. The Court will therefore grant the United States' motion. During the pendency of this lawsuit, the State of Idaho will be enjoined from enforcing Idaho Code § 18-622 to the extent that statute conflicts with EMTALA-mandated care.

BACKGROUND

A. The Emergency Medical Treatment and Labor Act

Congress enacted EMTALA in 1986 with the overarching purpose of ensuring that all patients receive adequate emergency medical care—regardless of the patient's ability to pay and regardless of whether the patient qualifies for Medicare. *See Arrington v. Wong,* 237 F.3d 1066, 1073-74 (9th Cir. 2001) (citation omitted). Under that Act, when a patient arrives at an emergency department and requests treatment, the hospital must provide an appropriate screening examination "to determine whether or not an emergency condition" exists. 42 U.S.C. § 1395dd(a). An "emergency medical condition" is defined to include:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
>
> (i) 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,
>
> (ii) serious impairment to bodily functions, or
>
> (iii) serious dysfunction of any bodily organ or part; . . .

42 U.S.C. § 1395dd(e)(1).[1] If a hospital determines that a patient has an

[1] Sub-part (B) defines an emergency medical condition as it relates to "a pregnant woman having contractions," but that subsection is not relevant to the issues before the Court.

emergency medical condition, it must examine the patient and provide stabilizing treatment at the hospital, although a transfer is permitted under certain circumstances. 42 U.S.C. § 1395dd(b)(1). Under EMTALA, stabilizing an emergency medical condition generally means providing medical treatment "necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during" a discharge or transfer to another facility. 42 U.S.C. § 1395dd(e).

EMTALA applies to every hospital that has an emergency department and participates in Medicare. *See* 42 U.S.C. § 1395cc(a)(1)(I). And a participating hospital that fails to comply with EMTALA's screening requirement, stabilizing treatment, or transfer provisions may be subject to civil monetary penalties up to $119,942 per violation. 42 U.S.C. § 1395dd(d)(1)-(2); 42 C.F.R. §1003.500 (2017). Likewise, treating physicians who violate EMTALA face civil monetary penalties of up to $119,942 per violation and exclusion from Medicare and state health care programs. 42 U.S.C. § 1395dd(d)(1); 42 C.F.R. §1003.500.

B. Idaho's Criminal Abortion Law[2]

Idaho Code § 18-622 is set to take effect on August 25, 2022. It provides

[2] Idaho has enacted a series of statutes criminalizing abortion. The statute at issue here—and referred to at times as the "criminal abortion law" or the "Total Abortion Ban"—is codified (Continued)

that "[e]very person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion." Idaho Code § 18-622(2). Abortion is defined as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." § 18-604(1). Pregnancy, in turn, is defined as "the reproductive condition of having a developing fetus in the body and commences at fertilization." § 18-604(11).

Criminal abortion is a felony punishable by at least two, and up to five, years' imprisonment. § 18-622(2). In addition, "any health care professional who performs or attempts to perform or who assists in performing or attempting to perform an abortion" faces professional licensure suspension for a minimum of six months upon a first offense and permanent revocation for subsequent offenses. *Id.*

The statute provides two affirmative defenses. As relevant here, an accused physician may avoid conviction by proving, by a preponderance of the evidence, that:

> (1) 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; and

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at Idaho Code § 18-622. Not at issue is the later-enacted *Fetal Heartbeat Preborn Child Protection Act,* codified at Idaho Code § 18-8801 to 18-8808. According to Idaho Code § 18-8805, if Idaho Code § 18-622 becomes enforceable, the penalties specified in the Heartbeat Act will be superseded by §18-622. *See* Idaho Code § 18-8805(4).

(2) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman.

Idaho Code § 18-622(3)(a)(ii) and (iii).

C. Facts

Idaho has roughly 22,000 births per year. Not surprisingly then, some patients will experience serious, pregnancy-related complications that qualify as an "emergency medical condition" under EMTALA. *See generally Fleisher Dec.* ¶ 12, Dkt. 17-3; *Corrigan Dec.* ¶¶ 9-30, Dkt. 17-6; *Cooper Dec.* ¶¶ 6-12, Dkt. 17-7; *Seyb Dec.* ¶¶ 4-13, Dkt. 17-8.

One relatively straightforward example is a patient who presents at an emergency department with an ectopic pregnancy. *Id.* ¶ 13. Accounting for about 2% of all reported pregnancies, ectopic pregnancies occur when an embryo or fetus grows outside of the uterus, most frequently in a fallopian tube. *Ex. B. to Fleisher Dec.*, Dkt. 17-4, at 91. It is undisputed that an ectopic pregnancy in a fallopian tube is an emergency medical condition that places the patient's life in jeopardy. Left untreated it will cause the fallopian tube to rupture and, in the majority of cases, cause significant and potentially fatal internal bleeding. *See, e.g.*, *White Dec.* ¶ 3, Dkt. 66-1. Likewise, the parties do not dispute that the appropriate treatment for an

ectopic pregnancy is either "emergency surgery and removal of the involved fallopian tube, including the embryo or fetus, or administration of a drug to cause embryonic or fetal demise." *Fleisher Dec*. ¶ 13, Dkt. 17-3. Still, though, during oral argument, the State conceded that the procedure necessary to terminate an ectopic pregnancy is a criminal act, given the broad definitions used in Idaho's criminal abortion statute.

In addition to ectopic pregnancies, there are many other complications that may arise during pregnancy—all of which may place the patient's health in serious jeopardy or threaten bodily functions. Despite the risks such conditions present, it is not always possible for a physician to know whether treatment for any particular condition, at any particular moment in time, is "necessary to prevent the death" of the pregnant patient, which is the prerequisite to their relying on the affirmative defense offered by the criminal abortion statute. *See Fleisher Dec*. ¶¶ 13-21, Dkt. 17-3. Some examples include the following scenarios:

- A patient arrives at an emergency room with nausea and shortness of breath, leading to a diagnosis of preeclampsia. Preeclampsia can quickly progress to eclampsia, with the onset of seizures.

- A woman arrives at an emergency room with an infection after the amniotic sac surrounding the fetus has ruptured. That condition can progress into sepsis, at which point the patient's organs may fail.

- A patient arrives at the hospital with chest pain or shortness of breath, which leads the physician to discover elevated blood

pressure or a blood clot.

- A patient arrives at the emergency room with vaginal bleeding caused by a placental abruption. Placental abruption is when the placenta partly or completely separates from the inner wall of the uterus. It can lead to catastrophic or uncontrollable bleeding. If the bleeding is uncontrollable, the patient may go into shock, which could result in organ disfunction such as kidney failure, and even cardiac arrest.

Id. ¶¶ 15-22.

Idaho physicians have submitted declarations describing specific patients who have presented with these types of complications and have required abortions.[3] Each of these conditions unquestionably qualifies as an "emergency medical condition" under EMTALA. Accordingly, if future patients with similar conditions presented at Medicare-funded hospitals, they would be entitled to the emergency care required by EMTALA—which will often include an emergency abortion.

The impact of Idaho's criminal abortion statute on the emergency care

[3] *See Corrigan Dec.* ¶¶ 9-30, Dkt. 17-6 (describing three patients who required abortions after experiencing, respectively, (1) severe infection due to premature rupture of the membranes; (2) placental abruption which other medications and blood products failed to mitigate; and (3) preeclampsia with pleural effusions and high blood pressure); *Cooper Dec.* ¶¶ 6-11, Dkt. 17-7 (describing three patients who required abortions after experiencing, respectively, (1) preeclampsia with severe features, (2) HELLP syndrome, and (3) lab abnormalities consistent with a diagnosis of HELLP syndrome); *Seyb Dec.* ¶¶ 7-13, Dkt. 17-8 (describing three patients who required abortions after experiencing, respectively, (1) a septic abortion, (2) preeclampsia with severe features, and (3) heavy vaginal bleeding).

dictated by EMTALA is substantial. The United States has submitted declarations from four physicians practicing in Idaho who say that if Idaho Code § 18-622 goes into effect, they believe "there will be serious and negative consequences for patients and healthcare workers alike." *Corrigan Supp. Dec.* ¶ 13, Dkt. 86-3. Dr. Emily Corrigan, a board-certified Obstetrician-Gynecologist practicing at a Boise hospital, explains why this is so. First, she speaks specifically as to three recent patients—all of whom presented with emergency medical conditions and required an abortion. She says that for each of these patients, it was "medically impossible to say that death was the guaranteed outcome." *Id.* ¶ 8. Regarding Jane Doe 1, for example, she says that this patient "could have developed severe sepsis potentially resulting in catastrophic injuries such as septic emboli necessitating limb amputations or uncontrollable uterine hemorrhage ultimately requiring hysterectomy but [she] could still be alive." *Id.* Jane Does 2 and 3 were in similar situations—they could have survived, but each "potentially would have had to live the remainder of their lives with significant disabilities and chronic medical conditions as a result of their pregnancy complication." *Id.*.

More broadly, Dr. Corrigan says that "while the State's physician declarations speak in terms of absolutes," in her view, "medicine does not work that way in most cases. Death may be a possible or even probable outcome, but different outcomes or conditions may also be probable. That is why doctors

frequently refuse to answer the question, 'What are my chances?'" *Id.* ¶ 9.

Dr. Corrigan also points out that if Idaho Code § 18-622 goes into effect, patient care will be delayed. *Id.* ¶ 11. She says that, under Idaho's law, physicians must "wait until death is near-certain and in the meantime, the patient will experience pain and complications that may have lifelong disabling consequences." *Id.* Ultimately then, from her perspective, "[a] physician administering an emergency abortion in Idaho would be risking their professional license, livelihood, personal security, and freedom." *Id.*

Compliance with the EMTALA standards is significant to this state's health care system. In Idaho, there are thirty-nine hospitals that receive Medicare funding and provide emergency services. *Wright Dec.* ¶ 8, Dkt. 17-9. Between 2018 and 2020, these hospitals' emergency departments received approximately $74 million in federal Medicare funding, which was conditioned on compliance with EMTALA. *Shadle Dec.* ¶ 6, Dkt. 17-10.

LEGAL STANDARD

The United States asks for a preliminary injunction to enjoin Idaho from enforcing its criminal abortion law to the extent it conflicts with EMTALA-mandated care. "A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Fraihat v. United States Immigration & Customs Enf't*, 16

F.4th 613, 635 (9th Cir. 2021) (citation omitted).

To obtain relief, the United States must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 24 (2008). As to the last two factors, "[w]here the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge." *Padilla v. Immigration & Customs Enf't*, 953 F.3d 1134, 1141 (9th Cir. 2020).

"A district court has considerable discretion in granting injunctive relief and in tailoring its injunctive relief." *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008). Generally, a court must ensure that the relief is "tailored to eliminate only the specific harm alleged" and not "overbroad." *E.&J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992). "[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). And in the context of enjoining a state statute subjected to an as-applied challenge, the Supreme Court has said, "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We . . . enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S.

320, 328-29 (2006).

ANALYSIS

The key substantive question this Court must address is whether Idaho Code § 18-622 conflicts with certain requirements of the federal Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd. But before turning to that question, the Court will resolve three threshold issues: (1) whether the United States has a cause of action; (2) whether the United States has standing; and (3) whether the United States has mounted a facial or an as-applied attack to the challenged statute.

A. Cause of Action

The United States has the unquestioned authority to sue. It has asked this Court, sitting in equity, to partially enjoin the enforcement of Idaho Code § 18-622 because of its direct conflict with a federal statute. Such a Supremacy Clause claim fits squarely within causes of action the Supreme Court has recognized. As the Supreme Court explained in *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question." *Id.* at 96 n.14; *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015) ("[W]e have long recognized, if an individual claims federal law immunizes him

from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted."). Here, the United States has a cause of action because it seeks to halt Idaho's allegedly unconstitutional encroachment on EMTALA; it is not seeking to enforce federal law against would-be violators. This case is therefore distinct from the line of cases where plaintiffs challenge state administrative action taken under a particular statute, as opposed to challenging the validity of the state statute itself. *See*, *e.g.*, *Armstrong*, 575 U.S. at 324.

In a somewhat related argument, the State, in its briefing, attempted to raise[] serious concerns that EMTALA's required stabilizing treatment, as interpreted by the United States and expressed in this litigation, is invalid as coercive spending clause legislation." *State Br.*, Dkt. 66, at 19 n.10 (citing *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575-87 (2012)). To the extent this "concern" is an argument, it is not sufficiently developed here. *Cf. Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 930 (9th Cir. 2003) ("We require contentions to be accompanied by reasons."). The State cannot challenge the constitutionality of a 35-year-old federal statute in a passing footnote. More importantly, deciding that question would "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise

facts to which it is to be applied.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)).

B. Standing

To establish standing, the United States must demonstrate that it has suffered an injury in fact that is fairly traceable to Idaho's actions and that will likely be redressed by a favorable decision from the Court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

Here, United States alleges at least three types of harm. First, the United States' sovereign interests are harmed when its laws are violated. *See Vt. Agency of Nat. Res. v. United States ex rel Stevens,* 529 U.S. 765, 771 (2000); *United States v. Arizona,* 641 F.3d 339, 366 (9th Cir. 2011), *rev'd in part on other grounds,* 567 U.S. 387 (2012). Second, if Idaho Code § 18-622 goes fully into effect, pregnant patients throughout Idaho will be denied EMTALA-mandated care. As a general principle, the United States may sue to redress widespread injuries to the general welfare. *In re Debs*, 158 U.S. 564, 584 (1895). Third, the United States has alleged that Idaho's law deprives it of the benefits of its bargain in that it has provided Medicare funding to hospitals within Idaho, and that funding was conditioned on those hospitals' compliance with EMTALA.

From there, the standing analysis is simple. The harms the United States

alleges are traceable to Idaho's actions in enacting and, soon, enforcing Idaho Code § 18-622. And the remedies sought here would redress the injury. The United States thus has established standing.

C. Facial versus As-Applied

"As a general matter, a facial challenge is a challenge to an entire legislative enactment or provision," *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011), and a successful facial challenge "invalidates the law itself." *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018). An as-applied challenge, on the other hand, "challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific circumstance." *Hoye*, 653 F.3d at 857. Thus, "a successful as-applied challenge invalidates only the particular application of the law." *Italian Colors*, 878 F.3d at 1175 (internal quotation and citation omitted).

Ultimately, though, "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010) (acknowledging that plaintiffs' claim had characteristics of both an as-applied and facial challenge). Rather, the "important" inquiry is whether the "claim and the relief that would follow . . . reach beyond the particular circumstances of the[ ] plaintiffs." *Id.* In other words, the distinction between the two types of challenges mainly goes to the breadth of the remedy.

Here, a quick skim of the United States' complaint reveals an as-applied

challenge. In its prayer for relief, the United States asks the Court to issue a declaratory judgment stating that "Idaho Code § 18-622 violates the Supremacy Clause and is preempted and therefore invalid *to the extent that it conflicts with EMTALA*." *Compl.* ¶ 16, Dkt. 1 (emphasis added). The complaint repeats that limiting language in the prayer for injunctive relief. *Id.* And in moving for a preliminary junction, the United States once again—and repeatedly—clarified that it is seeking a limited form or relief. *See, e.g.*, *Mtn.*, Dkt. 17-1, at 8.

The State acknowledges this limiting language but nevertheless argues that the United States is bringing a facial challenge, based on the United States' argument that there is a conflict in *all* instances in which both EMTALA and Idaho Code § 18-622 apply. The State says this isn't so because, at times, the two statutes can operate harmoniously.

The Court does not find the State's argument persuasive because it has failed to properly account for the staggeringly broad scope of its law, which has been accurately characterized by this Court and the Idaho Supreme Court as a "Total Abortion Ban." *See Planned Parenthood Great Nw. v. Idaho*, --- P.3d ---, 2022 WL 3335696, at *1 (Idaho Aug. 12, 2022). As will be discussed more fully below, Idaho Code § 18-622 doesn't just criminalize EMTALA-mandated abortions; it criminalizes all abortions. So, in that sense, the United States has mounted a textbook, as-applied challenge focusing only on a particular application of the

statute in a particular context. After all, Idaho Code § 18-622 will take effect on August 25, 2022, regardless. The United States is not trying to stop that. The only question this Court is addressing is whether the statute must include a carve-out for EMTALA-mandated care. The United States has mounted an as-applied challenge.

Moreover, even if the Court were to construe the challenge as a facial one—focusing only on the subset of abortions EMTALA requires—the United States is still likely to succeed on the merits of its claim. As explained below, even within that subset there will always be a conflict between EMTALA and Idaho Code § 18-622.

D. Likelihood of Success on the Merits

With these threshold questions resolved, the Court turns to whether the United States is entitled to a preliminary injunction. The first question—whether the United States is likely to succeed on the merits—is the most important. *California v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020). To resolve that question, the Court is guided by the Supremacy Clause and basic preemption principles.

1. The Supremacy Clause & Preemption

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. "Congress may consequently pre-empt, *i.e.*, invalidate, a state law through federal legislation." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015).

In EMTALA, Congress indicated its intent to displace state law through an express preemption provision, which says EMTALA preempts state law only "to the extent that the [state law] requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). The Ninth Circuit has construed EMTALA's "directly conflicts" language as referring to two types of preemption—impossibility preemption and obstacle preemption. *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993). Impossibility preemption occurs, straightforwardly, "where it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). And obstacle preemption exists where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 373.

2. Impossibility Preemption

Here, it is impossible to comply with both statutes. As already discussed, when pregnant women come to a Medicare-funded hospital with an emergency medical condition, EMTALA obligates the treating physician to provide stabilizing treatment, including abortion care. But regardless of the pregnant patient's condition, Idaho statutory law makes that treatment a crime. Idaho Code § 18-622(2). And where federal law requires the provision of care and state law criminalizes that very care, it is impossible to comply with both laws. Full stop.

The statute's affirmative defense does not cure the impossibility. An affirmative defense is an excuse, not an exception. The difference is not academic. The affirmative defense admits that the physician committed a crime but asserts that the crime was justified and is therefore legally blameless. And it can only be raised after the physician has already faced indictment, arrest, pretrial detention, and trial for every abortion they perform. *See generally United States v. Sisson*, 399 U.S. 267, 288 (1970) (indictments need not anticipate affirmative defenses). So even though accused healthcare workers might avoid a conviction, the statute still makes it impossible to provide an abortion without also committing a crime.

Moreover, even taking the affirmative defense into account, the plain language of the statutes demonstrates that EMTALA requires abortions that the affirmative defense would not cover. When an abortion is the necessary stabilizing treatment, EMTALA directs physicians to provide that care if they reasonably expect the patient's condition will result in serious impairment to bodily functions, serious dysfunction of any bodily organ or part, or serious jeopardy to the patient's health. 42 U.S.C. § 1395dd(3)(1). In contrast, the criminal abortion statute admits to no such exception. It only justifies abortions that the treating physician determines are *necessary* to prevent the patient's death. Idaho Code § 18-622(a)(ii) (emphasis added). According to the dictionary, the word "necessary" means something is "needed" or "essential." *See Necessary*, Black's Law Dictionary

(11th ed. 2019). And the Idaho Supreme Court has said that "[w]hen engaging in statutory interpretation," it "begins with the dictionary definitions of disputed words or phrases contained in the statute." *Idaho v. Clark*, 484 P.3d 187, 192 (Idaho 2021). Thus, an abortion is only justified under the statute if the treating physician can persuade the jury that she made a good faith determination that the patient would have died if the abortion had not been performed.

EMTALA is thus broader than the affirmative defense on two levels. First, it demands abortion care to prevent injuries that are more wide-ranging than death. Second, and more significantly, it calls for stabilizing treatment, which of course may include abortion care—when harm is probable, when the patient could "reasonably be expected" to suffer injury. In contrast, to qualify for the affirmative defense, the patient's death must be imminent or certain absent an abortion. It is not enough, as the Legislature has argued, for a condition to be life-threatening, which suggests only the *possibility* of death. *See Life-Threatening*, Black's Law Dictionary (11th ed. 2019) ("illness, injury, or danger that *could* cause a person to die") (emphasis added).

Finally, as the Court discusses further below, when the defense is put up against the realities of medical judgments, its scope is tremendously ambiguous. Although this makes it difficult to determine whether some abortions would qualify for both the affirmative defense and be mandated by EMTALA, that

question is ultimately immaterial to the Court's determination that it is impossible for physicians to comply with both statutes.

Seeking to skirt the conflict between federal and state law, the Legislature advances three main points. First, the Legislature submits declarations from two physicians who offer up opinions as to what Idaho Code § 18-622 means. They say that terminating a pregnancy to save the life of the pregnant woman is *never* considered an abortion under Idaho law. *French Dec.* ¶¶ 14, 17, Dkt. 71-5; *Reynolds Dec.* ¶ 12, Dkt. 71-1. But as already discussed, on its face, the Idaho law criminalizes *all* procedures *intended* to terminate a pregnancy, even if necessary to save the patient's life or to preserve her health. *See* Idaho Code § 18-604(1). And it should go without saying that Idaho law controls the inquiry on this point—not the medical community. Indeed, if anything, this argument crystallizes the conflict between Idaho law and EMTALA: Idaho law criminalizes as an "abortion" what physicians in emergency medicine have long understood as both life- and health-preserving care.

The Legislature's primary example of ectopic pregnancies as falling outside the statutory prohibition further reveals the fallacy of their argument: Idaho law expressly defines "pregnancy" as "having a developing fetus in the body" and commencing at fertilization. Idaho Code § 18-604(11). This plain language, which refers to "the body," rather than the uterus, and "fertilization" rather than

implantation, evinces the Legislature's intent to include ectopic pregnancies within the statutory definition of "pregnancy." *See Worley Highway Dist. v. Kootenai Cnty.*, 576 P.2d 206, 209 (Idaho 1978). As such, termination of an ectopic pregnancy falls within the definition of an "abortion." The Legislature cannot avoid the effect of its chosen statutory language by relying on the medical community's definition of what is (and what is not) an abortion.

The Legislature next says that terminations of ectopic pregnancies—or any other, similar lifesaving procedures—do not fall within the scope of the statute because such terminations are "covered" by the exemption of Idaho Code § 18-622(4). *See French Dec.* ¶ 15, Dkt. 71-5. This sub-section exempts from the statute's prohibitions medical treatment provided to pregnant women that results in the "*accidental* death" or "*unintentional* injury" to the fetus. Idaho Code § 18-622(4). But certain pregnancy-related conditions, such as ectopic pregnancy, require pregnancy termination to preserve a patient's health or save her life—and the "death" or "injury" to the "unborn child" in that situation will be neither accidental nor unintentional. *See Cooper Dec.* ¶ 3, Dkt. 17-6; *Fleisher Dec.* ¶ 13, Dkt. 17-3; *Seyb Dec.* ¶ 6, Dkt. 17-8. It is therefore nonsensical to classify it as such, simply because the pregnancy was terminated to save the life or health of the mother.

Second, during oral argument, the Legislature acknowledged the

"conceptual textual conflicts" between § 18-622 and EMTALA but entreated the Court to ignore the Idaho statute's text and focus instead on "what happens in the real world." Even if the Court accepted this invitation to ignore what the law says, the Legislature's speculations about how the law will work in practice are belied by the actual, "real-life" experience of medical professionals in Idaho who regularly treat women in these situations. They conclude that emergency care normally provided to pregnant patients will be made criminal by the plain language of § 18-622, which will, in turn, hinder their ability to provide that care if the law goes into effect. *See Corrigan Dec.* ¶¶ 31-35, Dkt. 17-6; *Cooper Dec.* ¶ 12, Dkt. 17-7; *Seyb Dec.* ¶ 13, Dkt. 17-8. As one Idaho physician testified, OB/GYN physicians in Idaho have been "bracing for the impact of this law, as if it is a large meteor headed towards Idaho." *Supp. Cooper Dec.* ¶ 13, Dkt. 86-3. More fundamentally, if the law does not mean what it says, why have it at all?

In short, given the extraordinarily broad scope of Idaho Code § 18-622, neither the State nor the Legislature have convinced the Court that it is possible for healthcare workers to simultaneously comply with their obligations under EMTALA and Idaho statutory law. The state law must therefore yield to federal law to the extent of that conflict.

3. Obstacle Preemption

Moreover, even if it were theoretically possible to simultaneously comply

with both laws, Idaho law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 373. To be sure, the Supreme Court has cautioned that "a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 607 (2011) (citation and quotation omitted). Nevertheless, that threshold is met when it is plain that "Congress made 'a considered judgment' or 'a deliberate choice' to preclude state regulation" because "a federal enactment clearly struck a particular balance of interests that would be disturbed or impeded by state regulation." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020) (*quoting Arizona*, 567 U.S. at 405).

"The first step in the obstacle preemption analysis is to establish what precisely were the purposes and objectives of Congress in enacting" the statute at issue. *Chamber of Commerce v. Bonta*, 13 F.4th 766, 778 (9th Cir. 2021). For nearly four decades, EMTALA has served as the bedrock for the emergency-care safety net. Congress enacted EMTALA primarily because it was "concerned that medically unstable patients are not being treated appropriately" including in "situations where treatment was simply not provided." H.R. Rep. No. 99-241, Pt. I, at 27 (1985). Congress's clear purpose was to establish a bare minimum of emergency care that would be available to all people in Medicare-funded hospitals.

See Arrington v. Wong, 237 F.3d 1066, 1073-74 (9th Cir. 2001).

Congress chose to use "federal sanctions" to ensure that emergency screening and treatment was available for "all individuals for whom care is sought." H.R. Rep. No. 99-241, Pt. III, at 4-5 (1985). But Congress was mindful that overly severe sanctions might lead "some hospitals, particularly those located in rural or poor areas, [to] decide to close their emergency rooms entirely rather than risk the . . . penalties that might ensue." *Id.* at 6. Notably, Congress took care to avoid sanctions that would "result in a decrease in available emergency care, rather than an increase in such care, which appears to have been the major goal of [EMTALA]." *Id.*

Here, Idaho's criminal abortion statute, as currently drafted, stands as a clear obstacle to what Congress was attempting to accomplish with EMTALA. As discussed below, Idaho's criminal abortion law will undoubtedly deter physicians from providing abortions in some emergency situations. That, in turn, would obviously frustrate Congress's intent to ensure adequate emergency care for all patients who turn up in Medicare-funded hospitals.

a. Idaho Code § 18-622 Deters Abortions

It goes without saying that all criminal laws have some deterrent effect. But the structure of Idaho's criminal abortion law—specifically that it provides for an affirmative defense rather than an exception—compounds the deterrent effect and

increases the obstacle it poses to achieving the goals of EMTALA.

For one, the process of enduring criminal prosecution and licensing authority sanctions has a deterrent effect, regardless of the outcome. As Dr. Corrigan aptly explained, "[h]aving to defend against such a case would be incredibly burdensome, stressful, costly." *Corrigan Dec.* ¶ 10, Dkt. 17-6. By criminalizing all abortions, Idaho guarantees that physicians will have to accept this hardship every time they perform an abortion. The result is reluctance to perform abortions in any circumstances.

The uncertain scope of the affirmative defense intensifies that result. Providers who might be willing to depend on the affirmative defense do not have the clarity to do so because of the statute's ambiguous language and the complex realities of medical judgments.

Consider what a defendant-physician needs to prove to avail herself of the affirmative defense. The core of the affirmative defense at issue requires the defendant-physician to show she determined "the abortion was necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(2). In that sense, the defense is objective—either the defendant-physician made the determination, or she did not. Yet the nature of that determination—how imminent a patient's death must before an abortion is necessary—is inscrutable.

Applying the standard to another medical context shows its ambiguity. Say a

sovereign adopted a law that allowed oncologists to provide cancer treatment "only when necessary to prevent death." Under that standard, oncologists would likely feel comfortable providing care to a patient with a stage four terminal cancer diagnosis. But what about a patient with stage one cancer? On the one hand, treatment may be lawful because the patient has a condition that, left untreated, will eventually, almost certainly cause death. On the other hand, the patient is not in danger of dying soon, so perhaps the oncologist needs to withhold treatment until the cancer progresses to the point where treatment is more obviously necessary to prevent death.

Idaho physicians treating pregnant women face this precise dilemma. As Dr. Cooper puts it, "For those patients who are clearly suffering from a severe pregnancy related illness and for which there is a clear indicated treatment, but death is not imminent, it is unclear whether I should provide the appropriate treatment because the circumstances may not justify the affirmative defense." *See Cooper Supp. Dec.* ¶ 2, Dkt. 86-5. In other words, when, precisely, does the "necessary-to-prevent-death" language apply? Healthcare providers can seldom know the imminency of death because medicine rarely works in absolutes. *Corrigan Supp. Dec.* ¶ 9, Dkt. 86-3. Instead, physicians treat patients whose medical risks "exist along a continuum" without bright lines to specify "when exactly a condition becomes 'life-threatening' or 'necessary to prevent the death'

of the pregnant patient." *Fleisher Supp. Dec.* ¶ 7, Dkt. 86-2; *see also Seyb Dec.* ¶ 13, Dkt. 17-8 (explaining that "'prevent the death of the pregnant woman'" standard is not useful because "this is not a dichotomous variable"). Faced with these limitations, physicians provide care by making "educated guess[es] . . . . [b]ut we can only rarely predict with certainty a particular outcome." *Corrigan Supp. Dec.* ¶ 9, Dkt. 86-3. Because medical needs present on a spectrum, in a given moment of decision, "[d]eath may be a possible or even probable outcome, but different outcomes may also be possible or probable." *Id.*

But the affirmative defense is only available to physicians once they make that often "medically impossible" determination that "death [i]s the guaranteed outcome." *Corrigan Supp. Dec.* ¶ 8; *see also ACEP et al Amicus Br.*, Dkt. 62 at 6 (describing the affirmative defense as "a legislatively imagined but medically nonexistent line"); *Fleisher Dec.* ¶ 12, Dkt. 17-3 ("[I]n some cases where the patient's health is unambiguously threatened, it may be less clear whether there is also a certainty of death without stabilizing treatment—and a physician may not ever be able to confirm whether death would result absent immediate treatment.").

In short, against the backdrop of these uncertain, medically complex situations, the affirmative defense is an empty promise—it does not provide any clarity. The upshot of this uncertainty is that even those providers willing to risk prosecution if they were confident in the availability of the affirmative defense will

be deterred from providing emergency abortion care under EMTALA, where the availability of the defense is so uncertain.

And the Legislature cannot step in and say there is no obstacle to providing EMTALA-mandated care—that these Idaho healthcare workers may comfortably forge ahead and provided emergency abortions—based on its assertion that Idaho prosecutors would not enforce the law as written.[4] The Legislature supports this argument with a single declaration from a single county prosecutor, who said he "would not prosecute any health care professional based on facts like those set forth in [the United States'] declarations, and that he "believe[s] no Idaho prosecuting attorney would do so." *Loebs Dec.* ¶ 7, Dkt. 71-6. But Idaho prosecutors have a statutory duty "to prosecute *all* felony criminal actions." Idaho Code § 31-2604(2) (emphasis added). And this one prosecutor lacks the authority to bind the other forty-three elected county prosecutors, let alone grand juries or citizens who might independently seek to initiate criminal proceedings, or any of the disciplinary boards that might pursue license revocation proceedings. *Cf.* Idaho

[4] The Legislature also submitted a declaration from a Nevada doctor who opines that the standard laid out in Idaho Code § 18-622 "provides a clear and workable standard" and that "physicians may proceed without the kinds of subjective 'fears' and 'chillings' suggested in the declarations of the three Idaho doctors.'" *Reynolds Dec.* ¶¶ 9-10, Dkt. 71-1. The Court does not find this assertion persuasive. At best, it's a difference of opinion—some doctors will be chilled; some won't. On balance, and based on the factual record before it, the Court finds that if Idaho Code §18-622 goes into effect, physicians practicing in Idaho are likely to be deterred from providing EMTALA-mandated care, including emergency abortions.

Code § 19-1108 (grand juries); *Idaho v. Murphy*, 584 P.2d 1236, 1241 (Idaho 1978) (citizen complaints); § 18-622(2).

One prosecutor's promise to refrain from enforcing the law as written, therefore, offers little solace to physicians attempting to navigate their way around both EMTALA and Idaho's criminal abortion laws—and whose "professional license, livelihood, personal security, and freedom" are on the line. *Corrigan Supp. Dec.* ¶ 11, Dkt. 86-3 ("Our malpractice insurance may not cover us for performing an act that some may view as a crime."). Indeed, the Ninth Circuit has expressly rejected the argument that courts may uphold a law merely because the enacting authority promises to enforce it only to the extent it is consistent with federal law. *United States v. City of Arcata*, 629 F.3d 986, 992 (9th Cir. 2010) (holding officials' "promise of self-restraint does not affect our consideration of the ordinances' validity" under preemption doctrine). Physicians performing health- or life-saving abortions should not be left to "the mercy of *noblesse oblige*." *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010) (citation omitted) ("We may not uphold the statutes merely because the state promises to treat them as properly limited.").

b. **Deterring Abortions is an Obstacle to EMTALA**

The clear and intended effect of Idaho's criminal abortion law is to curb abortion as a form of medical care. This extends to emergency situations,

obstructing EMTALA's purpose. Idaho's choice to impose severe and sweeping sanctions that decrease the overall availability of emergency abortion care flies in the face of Congress's deliberate decision to do the opposite.

The primary obstacle is delayed care. Under the status quo, physicians "rely upon their medical judgement or best practices for handling pregnancy complications." *Seyb Dec.* ¶ 13, Dkt. 17-8. But because of the criminal abortion statute, "providers will likely delay care for fear of criminal prosecution and loss of licensure." *Id.; see also Cooper Supp. Dec.* ¶ 7, Dkt. 86-5 ("provider fear and unease is real and widespread"). The incentive to do so is obvious—delaying care so that the patient gets nearer to death and thus closer to the blurry line of the affirmative defense. Providers may also delay care to allow extra time to consult with legal experts. *See, e.g.*, *Corrigan Dec.* ¶¶ 25, Dkt. 17-6.

Delayed care is worse care. "The goal in medicine is to effectively identify problems and treat them promptly so patients are stabilized *before* they develop a life-threatening emergency. The Idaho law requires doctors to do the opposite—to wait until abortion is necessary to prevent the patient's death. *See Huntsberger Dec.* ¶ 12, Dkt. 86-4. Rather than providing the stabilizing treatment that EMTALA calls for, Idaho subjects women in medical crisis to periods of "serious physical and emotional trauma" as they wait to get nearer and nearer to death. *Corrigan Supp. Dec.* ¶ 13, Dkt. 86-3.

The wait for care is troubling enough on its own. Even worse, delayed care worsens patient outcomes. As a result of delay, "[p]atients may experience serious complications, have negative impacts on future fertility, require additional hospital resources including blood products, and some patients may die." *Huntsberger Dec.* ¶ 15, Dkt. 86-4. A recent study of maternal morbidity in Texas confirms this. When a pregnant woman with specific pregnancy complications was treated with "the standard protocol of terminating the pregnancy to preserve the pregnant patient's life or health," the rate of serious maternal morbidity was 33 percent. *California et al Amicus Br.*, Dkt. 59 at 21.[5] That rate reached 57 percent, nearly doubling, when providers used "an expectant-management approach," meaning the physician provided "observation-only care until serious infection develops or the fetus no longer has cardiac activity." *Id*.

These delays in providing care frustrate EMTALA in two ways. First, delays frustrate Congress's intent to eliminate situations where treatment was simply not provided by providing for basic emergency treatment. Second, the worsened patient outcomes offend EMTALA's core purpose of ensuring that the most vulnerable people were not left to suffer catastrophic outcomes because of

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[5] Citing Anjali Nambiar et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, Am. J. Obstetrics & Gynecology (forthcoming 2022) (internet).

indifference from physicians—or, in this case, obstacles created by the State.

Another effect of Idaho's criminal abortion law is that it will likely make it more difficult to recruit OB/GYNs, who are on the front lines of providing abortion care in emergency situations. Because Idaho does not have in-state training for the specialty, all OB/GYNs must be recruited to come here. *Seyb Dec.* ¶ 14, Dkt. 17-8. But if these newly trained physicians "can practice in a state without these conflicts and risks, it is only natural that they would be deterred from practicing here." *Id.* By extension, OB/GYNs who are already practicing here may choose to leave or to change the nature of their practice. *See, e.g.*, *Corrigan Dec.* ¶ 32, Dkt. 17-6. In both cases, the end result is fewer providers performing health and life-saving abortions. This, again, is an obstacle to EMTALA because it disrupts Congress's careful balance to avoid overly severe sanctions that could lead to providers deciding not to provide emergency care.

In sum, cutting back on emergency abortion care quantitatively and qualitatively is a plain obstacle to EMTALA, which Congress enacted to ensure that all individuals—including pregnant women—have access to a minimum level of emergency care.

E. Likelihood of Irreparable Harm

Having concluded that that the United State is likely to succeed on the merits of its claims, the Court turns to whether the United States has shown it is likely to

suffer irreparable harm in the absence of an injunction.

The United States has met that burden, as Supremacy Clause violations trigger a presumption of irreparable harm when the United States is a plaintiff. *See generally United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *rev'd in part on other grounds*, 567 U.S. 387 (2012) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm.") (citation omitted). As one court has explained, "The United States suffers injury when its valid laws in a domain of federal authority are undermined by impermissible state regulations." *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012).

And so it is here. If Idaho's criminal abortion statute is allowed to go fully into effect, federal law will be significantly frustrated—as discussed in detail above. Most significantly, allowing the criminal abortion ban to take effect, without a cutout for EMTALA-required care, would inject tremendous uncertainty into precisely what care is required (and permitted) for pregnant patients who present in Medicare-funded emergency rooms with emergency medical conditions. *See generally United States v. South Carolina*, 840 F. Supp. 2d 898, 925 (D.S.C. 2011) (finding irreparable harm where state immigration law "could create a chaotic situation in immigration enforcement"). The net result—discussed further in the next section—is that these patients could suffer irreparable injury in the absence of an injunction.

F. The Balance of Equities and the Public Interest

The next question is whether the balance of equities tips in the United States' favor and whether an injunction is in the public interest. As noted above, because the United States is a party, these two factors merge. The key consideration here is what impact an injunction would have on non-parties and the public at large. *Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003).

Looking first to the public at large, in the most general sense, "preventing a violation of the Supremacy Clause serves the public interest." *United States v. California*, 921 F.3d 865, 893-94 (9th Cir. 2019) (citing *Arizona*, 641 F.3d at 366). As the Ninth Circuit has explained, "it is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available. In such circumstances, the interest of preserving the Supremacy Clause is paramount." *Arizona*, 641 F.3d at 366 (cleaned up, citations omitted).

Next, based on the various declarations submitted by the parties, the Court finds that allowing the Idaho law to go into effect would threaten severe, irreparable harm to pregnant patients in Idaho. Speaking of patients, although the parties and the Court have often focused mainly on the actions and competing interests of doctors, prosecutors, legislators, and governors, we should not forget the one person with the greatest stake in the outcome of this case—the pregnant

patient, laying on a gurney in an emergency room facing the terrifying prospect of a pregnancy complication that may claim her life. One cannot imagine the anxiety and fear she will experience if her doctors feel hobbled by an Idaho law that does not allow them to provide the medical care necessary to preserve her health and life. From that vantage point, the public interest clearly favors the issuance of a preliminary injunction.

In that regard—and as discussed at some length above—the United States has submitted declarations from physicians explaining that there are any number of pregnancy-related complications that require emergency care mandated by EMTALA but that are forbidden by Idaho's criminal abortion law. Idaho physicians have treated such complications in the past, and it is inevitable that they will be called upon to do so in the future. Not only would Idaho Code § 18-622 prevent emergency care mandated by EMTALA, it would also discourage healthcare professionals from providing *any* abortions—even those that might ultimately be deemed to have been necessary to save the patient's life—given the affirmative-defense structure already discussed. Finally, if the abortion ban laid out in the Idaho statute goes into effect, the capacity of hospitals in neighboring states that do not prohibit physicians from providing EMTALA-mandated care (Washington and Oregon, for example)—would be pressured as patients may choose to cross state lines to get the emergency care they are entitled to receive

under federal law. *See* Dkt. 45-1, at 16-17.

Turning to the other side of the equitable balance sheet, the State of Idaho will not suffer any real harm if the Court issues the modest preliminary injunction the United States is requesting. In fact, as a practical matter, the State (and, to a much greater extent, the Legislature) argue that physicians who perform the types of emergency abortions at issue here won't violate Idaho law anyway; therefore, by their own reasoning, they will suffer no harm if enforcement of § 18-622 is enjoined on this limited basis. And although the State has argued that in the wake of *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), the public interest lies in allowing states to regulate abortions, *Dobbs* did not overrule the Supremacy Clause. Thus, even when it comes to regulating abortion, state law must yield to conflicting federal law. As such, the public interest lies in favor of enjoining the challenged Idaho law to the extent it conflicts with EMTALA.

ORDER

IT IS ORDERED that:

1. Plaintiff's motion for a preliminary injunction (Dkt. 17) is **GRANTED**.
2. The Court hereby restrains and enjoins the State of Idaho, including all of its officers, employees, and agents, from enforcing Idaho Code § 18-622(2)-(3) as applied to medical care required by the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd. Specifically, the State of

Idaho, including all of its officers, employees, and agents, are prohibited from initiating any criminal prosecution against, attempting to suspend or revoke the professional license of, or seeking to impose any other form of liability on, any medical provider or hospital based on their performance of conduct that (1) is defined as an "abortion" under Idaho Code § 18-604(1), but that is necessary to avoid (i) "placing the health of" a pregnant patient "in serious jeopardy"; (ii) a "serious impairment to bodily functions" of the pregnant patient; or (iii) a "serious dysfunction of any bodily organ or part" of the pregnant patient, pursuant to 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii).

3. This preliminary injunction is effective immediately and shall remain in full force and effect through the date on which judgment is entered in this case.

DATED: August 24, 2022

B. Lynn Winmill
United States District Judge

Erica Evancic

From: ecf@id.uscourts.gov
Sent: Wednesday, August 17, 2022 4:35 PM
To: CourtMail@idd.uscourts.gov
Subject: Activity in Case 1:22-cv-00329-BLW The United States v. State of Idaho Order on Motion for Leave to File

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U.S. District Court

District of Idaho (LIVE) NextGen 1.6

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Case Name: The United States v. State of Idaho
Case Number: 1:22-cv-00329-BLW
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Document Number: 75(No document attached)

Docket Text:
DOCKET ENTRY ORDER: Before the Court is the Idaho Legislature's Motion for Leave to File Legal Arguments [69]. Having considered the Legislature's Motion, the Court declines at this juncture to modify the conditions it imposed in its earlier Order [27] allowing the Legislature to permissively intervene. Allowing the Legislature to file an additional brief past the deadline of the expedited briefing schedule would unduly prejudice the United States, which must file its reply brief by 12:00 pm MST, on August 19, 2022. In addition, the Legislatures total briefing would exceed not only the 15-page limit imposed by the Court but would also exceed the 20-page limit imposed by the Local Rules to which both the United States and the State of Idaho have adhered. IT IS THEREFORE ORDERED that the Legislature's Motion for Leave to File Legal Arguments [69] is DENIED. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)

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Adam B. Aukland-Peck aaukland-peck@debevoise.com, mao-ecf@debevoise.com

Alan Wayne Foutz alan.foutz@ag.idaho.gov, colleen.funk@ag.idaho.gov

Amanda K Rice arice@jonesday.com

Anna Lynn Deffebach anna.l.deffebach@usdoj.gov

Brian David Netter brian.netter@usdoj.gov

Brian V Church brian.church@ag.idaho.gov, leslie.gottsch@ag.idaho.gov

Christopher A. Eiswerth christopher.a.eiswerth@usdoj.gov, fedprog.ecf@usdoj.gov

Daniel Schwei daniel.s.schwei@usdoj.gov

Daniel W. Bower dbower@morrisbowerhaws.com, eevancic@morrisbowerhaws.com, ghaws@morrisbowerhaws.com

Dayton Patrick Reed dayton.reed@ag.idaho.gov, elaine.maneck@ag.idaho.gov

Emily Nestler emily.b.nestler@usdoj.gov

Ingrid C Batey ingrid.batey@ag.idaho.gov, colleen.funk@ag.idaho.gov

Jacob M Roth yroth@jonesday.com

Jay Alan Sekulow sekulow@aclj.org

Jeffrey B. Dubner jdubner@democracyforward.org

Joan Elizabeth Callahan jec@naylorhales.com, allison@naylorhales.com, kim@naylorhales.com, trish@naylorhales.com

John Lewis jlewis@democracyforward.org, ecf@democracyforward.org

Jordan A. Sekulow jordansekulow@aclj.org

Julie Straus Harris julie.strausharris@usdoj.gov

Laura Etlinger laura.etlinger@ag.ny.gov

Laura Hernandez lhernandez@aclj.org

Leah S. Martin lmartin@debevoise.com, hlhubley@debevoise.com, imcanaan@debevoise.com, mao-ecf@debevoise.com, pluthra@debevoise.com

Lisa Newman lisa.n.newman@usdoj.gov

Megan Ann Larrondo megan.larrondo@ag.idaho.gov, colleen.funk@ag.idaho.gov, elaine.maneck@ag.idaho.gov

Monte N Stewart monteneilstewart@gmail.com, dbower@stm-law.com, dheller@stm-law.com, sarah.paralegal@yahoo.com

Olivia F. Summers osummers@aclj.org

Shannon Rose Selden srselden@debevoise.com, mao-ecf@debevoise.com

Steven Lamar Olsen steven.olsen@ag.idaho.gov, elaine.maneck@ag.idaho.gov

Stuart Roth stuartroth1@gmail.com

Wendy Olson wendy.olson@stoel.com, docketclerk@stoel.com, emina.hasanovic@stoel.com, hillary.bibb@stoel.com, karissa.armbrust@stoel.com, kelly.tonkin@stoel.com, tracy.horan@stoel.com

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant,

and

THE IDAHO LEGISLATURE,

Defendant-Intervenor.

Case No. 1:22-cv-00329-BLW

MEMORANDUM DECISION AND ORDER

Before the Court is the issue of whether to hold an evidentiary hearing before ruling on the United States' motion for a preliminary injunction. (Dkt. 17) For the reasons discussed below, the Court will not conduct an evidentiary hearing. Instead, the scheduled hearing on August 22, 2022 will only include argument.

BACKGROUND

The United States and the State of Idaho initially agreed that the Court did not need to conduct an evidentiary hearing on the motion for a preliminary injunction because it involved only legal issues. But then the Idaho Legislature

asked to intervene to present a factual opposition. The Court partially granted that motion, allowing the Legislature to offer evidence about the factual issues underlying the United States' motion.

After partially granting permissive intervention, the Court held an informal status conference to discuss the length and content of the upcoming motion hearing. At that time the Legislature made what was essentially a request for an evidentiary hearing. They argued that without live evidence, the Court could not make credibility determinations or resolve factual disputes in the parties' declarations (which, at that point, had not been fully submitted to the Court). The Court has now reviewed all the declarations.

DISCUSSION

A district court does not need to hold an evidentiary hearing before ruling on a preliminary injunction. In fact, the Ninth Circuit has "rejected any presumption in favor of evidentiary hearings, especially if the facts are complicated." *Kenneally v. Lungren*, 967 F.2d 329, 335 (9th Cir. 1992) (quoting *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990)). Even more, the Ninth Circuit explicitly declined to follow a rule that would require "presenting oral testimony when the pleadings and affidavits are conflicting." *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986). *See*

also Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1326 (9th Cir. 1994) ("[T]he refusal to hear oral testimony at a preliminary injunction hearing is not an abuse of discretion if the parties have a full opportunity to submit written testimony and to argue the matter.").

Instead, the Ninth Circuit has given district courts general principles to guide the exercise of discretion: "Where sharply disputed [] facts are simple and little time would be required for an evidentiary hearing, proceeding on affidavits alone might be inappropriate. . . . But an evidentiary hearing should not be held when the magnitude of the inquiry would make it impractical." *Nelson*, 799 F.2d at 555. Courts should also consider "general concepts of fairness, the underlying practice, the nature of the relief requested, and the circumstances of the particular case[]." *Id.*

The Court finds that this case is poorly suited to an evidentiary hearing on several grounds. In the Court's assessment, the declarations on file provide a sufficient basis to make an informed decision. Equally important, the bulk of the purported factual dispute is actually a legal dispute—the meaning of Idaho Code § 18-622 and its overlap with EMTALA, 42 U.S.C. § 1395dd, are legal questions, not factual ones.

What is more, to the extent there is a factual dispute, it centers around

subjective medical assessments—in what circumstances physicians can determine "in [their] good faith medical judgment" that abortion is "necessary to prevent the death of the pregnant woman." Idaho Code § 18-622. That is precisely the kind of complex factual dispute that is impractical to resolve at an evidentiary hearing at this point in the litigation. Moreover, the large magnitude of that inquiry would require a very lengthy evidentiary hearing. Given that the Court already has a mere two days to rule on the motion after the scheduled argument, holding a long evidentiary hearing creates an additional, untenable burden on the Court.

As a result, the Court finds that it is appropriate to rule on the United States' motion without holding an evidentiary hearing or hearing live testimony.

ORDER

IT IS ORDERED that the Legislature's request for an evidentiary hearing is **DENIED**.

DATED: August 17, 2022

B. Lynn Winmill
U.S. District Court Judge

EXHIBIT A

UNIQUE LEGAL ARGUMENTS OF THE IDAHO LEGISLATURE IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR PRELIMINARY INJUNCTION

The United States contends that the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395, preempts Idaho Code § 18-622 (622 Statute). *See* Mem. in Supp. of Mot. for a Prelim. Inj., *United States v. State of Idaho*, No. 1:22-cv-329-BLW (S.D. Idaho Aug. 8, 2022) (Mem.), Dkt. 17-1. Or, more simply, the Government says that Idaho cannot enforce its abortion law without violating federal law's protection of pregnant women in a medical crisis. But the Government's attempt to seize control of Idaho law falters at every step.

1. EMTALA Does Not Preempt Idaho's Abortion Trigger Law Expressly.

The Government asserts that EMTALA "contains an express preemption provision" that overrides Idaho's abortion trigger law. *Id.* at P. 5. Where a federal statute supposedly directs express preemption, what matters is "the plain wording" of that provision since its language "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

EMTALA states, "The provisions of this section *do not preempt* any State or local law requirement, except to the extent that the requirement *directly conflicts* with a requirement of this section." 42 U.S.C. § 1395dd(f) (emphasis added). Yet the Government tries to make this language do somersaults by reading the operative words "do not preempt" as an express preemption. *See* Mem. at P. 5. The Government likewise mistakes the exception for the rule by insisting that this provision merely "preserv[es] state laws requiring emergency care *beyond* what EMTALA mandates." *Id.* Read naturally, EMTALA manifests Congress's intention *not* to preempt state or local law unless it "directly conflicts" with EMTALA's requirements. 42 U.S.C. § 1395dd(f).

That slender exception does not help the Government. When determining the scope of express exemption, courts must "construe its preemptive effect as narrowly as possible." *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993). *Draper* explains that a state law "directly conflicts" with federal statute compliance with both is a "physical impossibility" or when the state law poses "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotations omitted). Neither applies here. Complying with EMTALA and Code Idaho Code § 18-622 is not physically impossible unless one reads EMTALA as a limitless mandate to perform an abortion whenever HHS determines that it is a "stabilizing treatment." 42 U.S.C. § 1395dd(b). Nor does section 18-622 pose an "obstacle" to achieving EMTLA's purposes, when the purpose was to "prevent patient dumping—the practice of refusing to treat uninsured patients." *Dollard v. Allen*, 260 F. Supp.2d 1127 (D. Wyo. 2003).

Any lingering question as to EMTALA's preemptive force must take account of Congress's mandate not to preempt state laws regulating medical care. A related provision provides that "[n]othing in *this subchapter* shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided … or to exercise any supervision or control over the administration or operation of any such institution, agency, or person." 42 U.S.C. § 1395. Section 1395 falls within Subchapter XVIII of the Social Security Act; so does EMTALA. It follows that EMTALA is bound by the anti-preemption directive in section 1395.

The Government tries to brush aside section 1395 with the boundless principle that 1395 "does not prevent the Federal Government from establishing and enforcing conditions of participation in Medicare." Mem. at P. 3. *Biden v. Missouri*, 142 S. Ct. 647 (2022), does not remotely support that notion. Its narrower holding simply casts aside the argument that section

1395 renders unlawful "nearly every condition of participation [HHS] has long insisted upon." *Id.* at 654. Our contention is more precise. Section 1395 prohibits federal officials and departments from supplanting Idaho law as it regulates the delivery of abortion services.

2. EMTALA Does Not Impliedly Preempt Idaho's Abortion Law.

Determining when a federal statute impliedly preempts state law primarily depends on "the purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (cleaned up). When Congress legislates in an area where state power usually predominates, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (quoted in *Lohr*, 518 U.S. at 485). EMTALA reflects an exercise of federal legislative power over public health—an area within traditional state police power. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985) (acknowledging the states' "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"). To overcome the presumption against preemption, the United States must show that "the clear and manifest purpose of Congress" in adopting EMTALA is to override state laws regulating abortion. *Rice*, 331 U.S. at 230.

The Government denies that the presumption against preemption applies because EMTALA preempts state law expressly. *See* Mem. at 3 (citing *Puerto Rico v. Franklin Calif. Tax-Free Tr.*, 579 U.S. 115, 125 (2016)). Since EMTALA manifests Congress's intent to discourage preemption—not allow it—traditional preemption principles apply. *See* 42 U.S.C. § 1395dd(f); *accord id.* at § 1395 (excluding preemption under the Social Security Act). The Government makes no attempt to satisfy the presumption against preemption, nor could it. Far from expressing the requisite "clear and manifest purpose" of preempting state laws, *Rice*, 331 U.S. at 230, both

EMTALA and 42 U.S.C. § 1395 express Congress's intent *not* to preempt state laws governing the practice of medicine.

Under these circumstances, the United States cannot fairly demonstrate a strong likelihood of success in prevailing on its claim that EMTALA preempts Idaho Code § 18-622.

3. The Government's Interpretation of EMTALA Raises Serious Constitutional Doubts.

The familiar principle of constitutional doubt offers an additional reason to resist the Government's interpretation of EMTALA. That rule "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." Antonin Scalia & Bryan A. Garner, Reading Law 247–48 (2012) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Government's reading of EMTALA raises serious constitutional doubts on three separate grounds.

A. *As read by the Government, EMTALA poses serious separation-of-powers conflicts because of the statute's deprivation of state authority affirmed by the Supreme Court.*

The Constitution divides power to secure liberty. Nowhere is that division more evident than the separation of powers among Congress, the Executive, and the Judiciary. *See Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021); *I.N.S. v. Chadha*, 462 U.S. 919, 947 (1983) (Burger, C.J.). The preliminary injunction, along with the complaint behind it, pose grave doubts that this lawsuit will undermine the separation of powers.

Only weeks ago, the Supreme Court of the United States delivered a historic decision by terminating the constitutional right to abortion.

> The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2284 (2022).

The Government's interpretation of EMTALA seeks to thwart this transfer of authority over abortion back to the American people and the states. Specifically, the United States seeks to enjoin Idaho's [abortion trigger statute] as contrary to EMTALA. *See* Mem. At P. 20. Although the Government assures the Court that the injunction would cover only "EMTALA-mandated care," *id.*, that reassurance is hollow when the Government interprets EMTALA broadly enough to require abortion as a "stabilizing treatment" even if not medically "necessary to prevent the death" of a pregnant woman. *Id.* at P. 10 (quoting the 622 Statute). Far from being limited to dangerous conditions like ectopic pregnancies or pre-eclampsia, the Government's position is that EMTALA contains a mandate of undefined extent. Under the Government's statutory reading, EMTALA requires all medical facilities participating in Medicare and Medicaid to provide abortion procedures whenever a physician determines that such a procedure offers "stabilizing treatment" for a woman in distress. *Id.* at P. 9 ("A number of conditions can arise during, or can be exacerbated by, pregnancy … [for which] a physician will determine that the stabilizing treatment for the patient's emergency condition is termination of the pregnancy."). And that position, with all respect, overrides the moral, political, and medical judgment of Idaho lawmakers to protect both mother and child by permitting abortion when necessary to save the mother's life and to allow abortion to terminate a pregnancy resulting from rape or incest, but not otherwise. *See* Idaho Code § 18-622.

The Government's strenuous efforts to stop Idaho's abortion law from coming into force raise grave doubts about the Executive's lawful authority to limit or defeat the Supreme Court's final judgment in *Dobbs*. Even if the United States could point to unambiguous statutory authority for its attempted blockade of Idaho law, EMTALA is a garden-variety statute that must give way to the Constitution insofar as they conflict. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177

(1803) (the constitution controls any legislative act repugnant to it."). Under that principle, the Supreme Court's final judgment in *Dobbs* must prevail over conflicting federal statutes. While EMTALA remains valid to the extent that it prescribes certain forms of medical care by institutions participating in Medicare and Medicaid, it cannot be read in a way that defeats the return of sovereignty over abortion to the people of every state. The people of Idaho enjoy constitutional authority to govern themselves on that topic, and no federal statute, however, overread by an Administration committed to countering *Dobbs*, can diminish that authority.

B. *As read by the Government, EMTALA poses serious concerns under the Major Questions Doctrine.*

Another separation-of-powers concern arises from a different direction. Under the major question 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 this rule applies, "something more than a merely plausible textual basis for the agency action is necessary." *Id.* at 2609. Requiring an unusually clear delegation of congressional authority over a matter of national significance reflects the nondelegation doctrine, which preserves the separation of powers by ensuring that "any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring). 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." *W. Va. v. EPA*, 142 S. Ct. 2587, 2609 (2022).

Three times in the past year alone, the Supreme Court has invoked the major question doctrine when declaring certain Administration initiatives unconstitutional.

In *West Virginia*, the Court invalidated an EPA rule that "capp[ed] carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity." *Id.* at 2616. The reason was simple and compelling. "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *Id.*

In *NFIB v. OSHA*, 142 S. Ct. 661 (2022), the Court issued a stay preventing OSHA from enforcing a rule that required large employers to ensure that their employees were vaccinated against COVID-19. *Id.* at 666–67. Although the vaccination mandate affected millions of employees, the Court found no clear statutory authorization justifying OSHA's rule. "Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category." *Id.* at 666.

And in *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), the Court similarly voided a nationwide eviction moratorium imposed by the Centers for Disease Control. *See id.* at Concluding that the challengers "are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority." *Id.* at 2486. In fact, the Court was stern in rebuffing the CDC's attempted power grab. "[T]he CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts." *Id.*

Here, the same essential doctrine of constitutional authority applies. The United States asserts that federal law precludes Idaho from regulating abortion insofar as it qualifies (in the

Government's view) as needed "stabilizing treatment" for a pregnant woman at a federally funded emergency center. *See* Mem. at PP. 8–11. But exerting federal control over state abortion law is undoubtedly a matter of "vast … political significance." *Utility Air Regulatory Group*, 573 U.S. at 324. It takes "more than a merely plausible textual basis" to justify the Government's assault on Idaho's legislative prerogatives. *Id.* at 2609. The United States must show that Congress has spoken with unusual clarity in requiring emergency rooms to perform abortion procedures even when unnecessary to save a mother's life. And that the Government has failed to do. A glancing reference to "[n]ecessary stabilizing treatment" hardly speaks with the requisite clarity to the issue of abortion procedures, given the prospect of upending Idaho law on a question of enormous public significance. 42 U.S.C. § 1395dd(b). By contrast, a controlling anti-preemption provision unmistakably bars federal offers and employees from "exercis[ing] any supervision or control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. § 1395. Like the CDC's eviction moratorium, the Government's weaponization of EMTLA grants the Government "a breathtaking amount of authority." *Ala. Assoc. of Realtors*, 141 S. Ct. at 2489. A virtually boundless conception of "stabilizing treatment" means that Government officials can order hospitals and emergency centers to perform abortion procedures under a wide variety of undefined circumstances, or risk the massive loss of federal funding. It is doubtful whether that result would satisfy the same Supreme Court that has insisted on congressional clarity to justify an agency's incursion into matters of national significance.

C. As read by the Government, EMTALA poses serious concerns about the limits of the Spending Clause.

Lastly, serious constitutional doubts about the Government's interpretation of EMTALA arise under the Spending Clause. That is the Clause granting Congress the power "to pay the Debts and provide for the … general Welfare of the United States." U.S. Const. art. I, § 8. To guard

against obliterating the fundamental distinction between federal and state powers, the Constitution places "limits on Congress's power … to secure state compliance with federal objectives." *NFIB v. Sebelius*, 567 U.S. 519, 576 (2012). For instance, when "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." *Id.* at 580. Federal strings may attach to federal dollars, but "the States must have a genuine choice whether to accept the offer." *Id.* at 588. Also, retroactive conditions on federal funding are disallowed. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) ("Though Congress' power to legislate under the spending power is broad, it does not include surprising the States with post-acceptance or 'retroactive' conditions."). Both limits are transgressed here.

First, the United States threatens to withhold all Medicare funding unless Idaho complies with the Government's novel abortion mandate under EMTALA. That threat is evident from an insistence that "a *hospital* participating in Medicare must comply with EMTALA as a condition of receiving federal funds" and that "*hospitals* enter into written agreements with the [HHS] Secretary confirming they will comply with EMTALA." *See* Mem., at P. 5 (emphasis added). The Government insists that EMTALA covers "all patients, not just for Medicare beneficiaries." *Id.* at P. 19. This expansive reading of EMTALA leads to a sweeping conclusion. Because Idaho Code § 18-622 governs all abortions performed in the state, the Government says, state law will "disrupt the [Medicare] program and deprive the United States of the benefit of its bargain by prohibiting Idaho hospitals from performing EMTALA-mandated services, notwithstanding that hospitals' receipt of Medicare funds is conditioned on them doing so." *Id.* On the Government's view, EMTALA requires Idaho hospitals to perform abortion procedures whenever the Government says so, and noncompliance may result in the loss of all Medicare funds.

Those funds are considerable. The Government estimates that between 2018–20, Idaho's hospitals received $3.4 billion in Medicare funds and the state's 39 emergency centers received $74 million in federal funding—all of which was "conditioned on compliance with EMTALA." *Id.* at 6. Framed in these terms, the threatened loss of federal funding is not limited to support for abortion-related emergency care or for abortion-related emergency care for Medicare beneficiaries. As the Government would have it, compliance with EMTALA embraces all Medicare-funded emergency centers and all patients—not only Medicare recipients. *Id.* at P. 6. Its memorandum lays out the case for denying Idaho hospitals funding under the Medicare program, solely because of its dispute with perceived noncompliance as to a single medical procedure governed by state law and available at 39 of 52 Medicare-certified hospitals. *Id*.

Threatening to withhold all Medicare-related funding for hospitals in Idaho unless emergency centers comply with an expansive interpretation of EMTALA exceeds the Government's authority under the Spending Clause. Consider a parallel threat in the original Affordable Care Act. There, states complained that "Congress [was] coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants unless the State accepts the new expanded funding and complies with the conditions that come with it." *NFIB*, 567 U.S. at 575. Agreeing with the states, the Court held that holding out the prospect of withholding a major portion of state healthcare aid amounted to "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 582 (footnote omitted). Likewise here. The Government's threat to withhold all federal funding to any emergency center found to violate EMTALA is not a policy nudge—but "a gun to the head." *NFIB*, 567 U.S. at 581.

Second, the United States has sprung this abortion mandate under EMTALA on Idaho long after it agreed to other conditions of participating in Medicare. Trying to impose its abortion

mandate on Idaho hospitals retroactively is an independent reason for concluding that the Government is exceeding its powers under the Spending Clause. *See Pennhurst*, 451 U.S. at 25.

In short, the United States has failed to show that it has a likelihood of succeeding on its claim that EMTALA preempts Idaho law. Even if the Government's reading of the statute were better supported, the doctrine of constitutional doubt counsels against that interpretation. It raises serious questions about EMTALA's validity as applied under the separation of powers, major question doctrine, and the Spending Clause. For all these reasons, the motion for preliminary injunction should be denied.

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 Intervenor-Defendants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant,

and

SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE,

Intervenor-Defendants.

Case No. 1:22-cv-00329-BLW

IDAHO LEGISLATURE'S MOTION FOR LEAVE TO FILE LEGAL ARGUMENTS

The Idaho Legislature respectfully moves this Court for leave to file certain legal arguments ("Legislature's unique legal arguments") in opposition to the Government's pending motion for preliminary injunction. The Legislature's unique legal arguments were not made by the Attorney General's Office in its 11:51 p.m. filing last night. *See* State of Idaho's Response to the United States' Motion for a Preliminary Injunction, Dkt. 66.

The Legislature's unique legal arguments are set forth in Exhibit 1 filed concurrently herewith.

In the Legislature's Brief in Opposition to the Government's Motion for Preliminary Injunction, Dkt. 65 at P. 13, we said:

> We have in hand a thorough-going analysis of the law governing any invocation and application of EMTALA. That analysis demonstrates that the Government's invocation and application of EMTALA here are accurately seen as wrong and abusive. Because of this Court's currently in-place order limiting the Legislature to fact issues and precluding it from making legal arguments, we cannot present that analysis in this brief and can only hope that the Attorney General's Office adequately mirrors what we have in hand (which we have shared with it).
>
> Our legal analysis demonstrates that:
>
> 1. EMTALA does not preempt the 622 Statute expressly.
> 2. EMTALA does not impliedly preempt the 622 Statute.
> 3. The Government's interpretation of EMTALA conflicts with serious constitutional doctrines.
>   a. As read by the Government, EMTALA poses serious separation-of-powers conflicts because of the statute's deprivation of state authority affirmed by the United States Supreme Court in Dobbs.
>   b. As read by the Government, EMTALA poses serious concerns that it violates the Major Questions Doctrine.
>   c. As read by the Government, EMTALA poses serious concerns that it violates the limits of the Spending Clause.

The Legislature's opposition brief then went on to say at P. 14:

> In the event this legal analysis is not adequately presented to the Court in defense of the 622 Statute, we will promptly accept this Court's prior invitation to seek a modification of the existing limits on the scope of the Legislature's intervention so as to be able to present the legal analysis to this Court.

We respectfully submit that, upon its review of the Legislature's unique legal arguments, this Court will conclude that:

1. those arguments are unique in that they are not made by the Attorney General or are not made from the same perspective, with the same application, and in the same depth;
2. they are important, material, and well-made arguments;
3. because of their timely submission, no party will be unduly prejudiced; and
4. the interests of justice call for their consideration by this Court.

On that basis, the Legislature respectfully requests that this Court grant it leave to file its unique legal arguments.

Dated this 17th day of August, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2022, 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
950 Pennsylvania Avenue NW
Washington, DC 20530
Email: brian.netter@usdoj.gov

Attorneys for Plaintiff

Daniel Schwei
DOJ-Civ
Federal Programs Branch
1100 L St NW, Ste 11532
Washington, DC 20530
Email: daniel.s.schwei@usdoj.gov

Attorneys for Plaintiff

Julie Straus Harris
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20530
Email: julie.strausharris@usdoj.gov

Attorneys for Plaintiff

Lisa Newman
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
Email: lisa.n.newman@usdoj.gov

Attorneys for Plaintiff

Anna Lynn Deffebach
DOJ-Civ
Civil Division- Federal Programs Branch
1100 L ST NW
Ste Lst 12104
Washington, DC 20005
Email: anna.l.deffebach@usdoj.gov

Attorneys for Plaintiff

Christopher A. Eiswerth
DOJ-Civ
Federal Programs Branch
1100 L Street, NW
Ste 12310
Washington, DC 20005
Email: christopher.a.eiswerth@usdoj.gov

Attorneys for Plaintiff

Emily Nestler
DOJ-Civ
1100 L Street
Washington, DC 20005
Email: emily.b.nestler@usdoj.gov

Attorneys for Plaintiff

Brian V Church
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Office of the Attorney General
954 W. Jefferson St., 2nd Floor
P.O. Box 83720
Boise, ID 83702-0010
Email: brian.church@ag.idaho.gov
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov

Attorneys for Defendant

Wendy J. Olson
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702-7705
Email: wendy.olson@stoel.com

Amicus The American Hospital Association and The Association of American Medical Colleges

Joan Elizabeth Callahan
NAYLOR & HALES, P.C.
950 W. Bannock Street
Boise, ID 83702
Email: jec@naylorhales.com

Attorneys for Defendant

Jacob M. Roth *(pro hac vice)*
Charlotte H. Taylor *(pro hac vice)*
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Email: ctaylor@jonesday.com
yroth@jonesday.com

Amanda K. Rice *(pro hac vice)*
JONES DAY
150 West Jefferson, Suite 2100
Detroit, MI 48226-4438
Email: arice@jonesday.com

Amicus The American Hospital Association and The Association of American Medical Colleges

Laura Etlinger *(pro hac vice)*
NYS Office of The Attorney General Division
of Appeals and Opinions
The Capitol
Albany, NY 12224
Email: laura.etlinger@ag.ny.gov

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

Jay Alan Sekulow *(pro hac vice)*
Jordan A. Sekulow *(pro hac vice)*
Stuart Roth *(pro hac vice)*
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave. NE
Washington, DC 20002
Email: sekulow@aclj.org
jordansekulow@aclj.org
stuartroth1@gmail.com

Amicus American Center for Law & Justice

Laura Hernandez *(pro hac vice)*
Olivia F. Summers *(pro hac vice)*
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
Email: lhernandez@aclj.org
osummers@aclj.org

Amicus American Center for Law & Justice

Shannon Rose Selden *(pro hac vice)*
Leah S. Martin *(pro hac vice)*
Adam B. Aukland-Peck *(pro hac vice)*
DEBEVOISE & PLIMPTON LLP
919 Third Ave.
New York, NY 10022
Email: srselden@debevoise.com
lmartin@debevoise.com
aauklandpeck@debevoise.com

Jeffrey B. Dubner *(PHV forthcoming)*
Skye L. Perryman *(PHV forthcoming)*
John T. Lewis *(PHV forthcoming)*
Maher Mahmood *(PHV forthcoming)*
DEMOCRACY FORWARD FOUNDATION
655 15th St. NW, Ste 800
Washington, D.C. 20005
Email: jdubner@democracyforward.org
sperryman@democracyforward.org
jlewis@democracyforward.org
mmahmood@democracyforward.org

Amicus American College of Emergency Room Physicians, Idaho Chapter of the American College of Emergency Physicians, American College of Obstetricians and Gynecologists, Society for Maternal-Fetal Medicine, National Medical Association, National Hispanic Medical Association, American Academy of Pediatrics, American Academy of Family Physicians, American Public Health Association, American Medical Association

Amicus American College of Emergency Room Physicians, Idaho Chapter of the American College of Emergency Physicians, American College of Obstetricians and Gynecologists, Society for Maternal-Fetal Medicine, National Medical Association, National Hispanic Medical Association, American Academy of Pediatrics, American Academy of Family Physicians, American Public Health Association, American Medical Association

/s/ Daniel W. Bower
Daniel W. Bower

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB #3586
Chief, Civil Litigation Division

MEGAN A. LARRONDO, ISB #10597
BRIAN V. CHURCH, ISB #9391
ALAN W. FOUTZ, ISB #11533
INGRID C. BATEY, ISB #10022
Deputy Attorneys General
CLAY R. SMITH, ISB #6385
Special Deputy Attorney General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
brian.church@ag.idaho.gov

JOAN E. CALLAHAN, ISB #9241
NAYLOR & HALES, P.C.
Special Deputy Attorney General
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Telephone No. (208) 383-9511
Facsimile No. (208) 383-9516
joan@naylorhales.com

Attorneys for Defendant State of Idaho

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant.

Case No. 1:22-cv-329

STATE OF IDAHO'S RESPONSE TO THE UNITED STATES' MOTION FOR A PRELIMINARY INJUNCTION (Dkt. 17)

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INTRODUCTION

The United States seeks here to undermine Idaho's policy choice of how to regulate abortion, as allowed by *Dobbs*, by wielding its substantial financial clout under the Medicare program to invalidate that choice. Rather than awaiting an actual instance of supposed conflict, it asks this Court for broad injunctive relief that far exceeds what settled legal principles countenance. The United States asks this Court to only partially read the Emergency Medical Treatment and Labor Act's preemption provision that says that "[t]he provisions of [EMTALA] do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). The United States' own declarations fail to demonstrate a direct conflict between EMTALA and Idaho Code § 18-622.

In sum, the United States seeks a far-reaching preliminary injunction—one manifestly inconsistent with the preemption provision in EMTALA—preventing the State, its officers, employees, and agents, from enforcing Idaho's abortion regulation when stabilizing treatment is required by EMTALA. But the United States has not met its burden for issuance of a preliminary injunction. It fails to satisfy the requirements of a facial challenge because it cannot demonstrate that all applications of Section 18-622 are inconsistent with EMTALA requirements. The other factors do not favor granting a preliminary injunction. The United States' motion for a preliminary injunction should be denied.

BACKGROUND

The federal government allows hospitals to participate as providers in its Medicare program. 42 U.S.C. §§ 1395-1395lll. "Medicare is a federally funded health insurance program for aged and disabled persons." *Palomar Med. Ctr. v. Sebelius*, 693 F.3d 1151, 1154-55 (9th Cir. 2012). A hospital, as a provider of services under Medicare, is subject to various requirements as

part of its relationship with the federal government, which are expressed in a provider agreement. 42 U.S.C. § 1395cc. A particular set of requirements applies to a hospital with an emergency department, which are expressed in the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd. By regulation, the Centers for Medicare and Medicaid Services (CMS) has more specifically identified what the provider agreement requires of hospitals with respect to EMTALA. 42 C.F.R. § 489.24. In this litigation, the United States contends that there is a conflict between the requirements of EMTALA and the soon-to-be-effective Idaho Code § 18-622.

I. The Emergency Medical Treatment and Labor Act (EMTALA)

Congress enacted EMTALA in 1986 to address the then-growing concern about "patient dumping"—the transfer or discharge of expensive-to-treat uninsured patients for whom "hospitals have an economic incentive to dump." Note, *Preventing Patient Dumping: Sharpening the COBRA's Fangs*, 61 N.Y.U. L. Rev. 1186, 1187-88 (1986) (citation omitted). EMTALA was passed to require hospital emergency departments to provide "adequate emergency room medical services to individuals who seek care, particularly as to the indigent and uninsured." *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1255 (9th Cir. 1995) (citing H.R. Rep. No. 241, 99th Cong., 1st Sess. (1986)); *see also Gatewood v. Wash. Healthcare Corp.*, 933 F.2d 1037, 1039, 290 U.S. App. D.C. 31, 33 (D.C. Cir. 1991).

For hospitals with an emergency department,[1] if a person "comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition," EMTALA requires that the hospital provide an "appropriate medical screening

[1] Federal regulations identify this as a hospital that is licensed to have an emergency department, or holds itself out as providing, or actually provides (for at least one-third of all outpatient visits) "care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment," 42 C.F.R. § 489.24(b).

examination within the capability of the hospital's emergency department" to determine whether an emergency medical condition exists. 42 U.S.C. § 1395dd(a).[2]

If a hospital determines that the individual has an emergency medical condition, the hospital must offer to provide stabilizing treatment or transfer. *Id.* § 1395dd(b)(1). If the hospital offers stabilizing treatment, it must, "within the staff and facilities available at the hospital," provide "for such further medical examination and such treatment as may be required to stabilize the medical condition." *Id.* § 1395dd(b)(1)(A). If the hospital offers to transfer the individual to another medical facility, it must do so in accordance with 42 U.S.C. § 1395dd(c). *Id.* § 1395dd(b)(1)(B).

With respect to stabilizing treatment, to "stabilize" means "with respect to an emergency medical condition, to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or [for a pregnant woman who is having contractions] to deliver (including the placenta)." *Id.* § 1395dd(e)(3)(A).

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[2] An emergency medical condition is defined by the statute, 42 U.S.C. § 1395dd(e)(1) to mean:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
>
> > (i) 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,
> > (ii) serious impairment to bodily functions, or
> > (iii) serious dysfunction of any bodily organ or part; or
>
> (B) with respect to a pregnant woman who is having contractions—
>
> > (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
> > (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

A hospital's obligation to a patient in the emergency department with an emergency medical condition under EMTALA is not indefinite or unlimited. Rather, the requirement to provide stabilizing treatment *ends* when either: (1) the patient is stabilized within the limits of the capabilities of the staff and facilities of the hospital; or (2) the hospital transfers the person to another hospital in accordance with EMTALA's requirements. 42 C.F.R. § 489.24(a)(ii). Further, "EMTALA's stabilization requirement ends when an individual is admitted for inpatient care." *Bryant v. Adventist Health Sys./West*, 289 F.3d 1162, 1168 (9th Cir. 2002). Hence, a hospital or physician has satisfied its EMTALA obligation when a patient is admitted by the hospital in good faith to provide further treatment even where the patient has not yet been stabilized. 42 C.F.R. § 489.24(d)(2)(i). Moreover, EMTALA does not apply to an inpatient "who was admitted for elective (nonemergency) diagnosis or treatment." *Id.* § 489.24(d)(2)(ii).

EMTALA also contains a preemption provision to prevent overriding state laws that may regulate the same arena but do not directly conflict with EMTALA. That provision provides: "The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f).

II. Idaho Code § 18-622

In 2020, the Idaho Legislature enacted the Trigger Law. S.B. 1385, 65th Leg., 2d Reg. Sess. (Idaho 2020). This legislation was codified at Idaho Code § 18-622. The U.S. Supreme Court's July 26, 2022 judgment in *Dobbs* means Idaho Code § 18-622 will be effective 30 days from July 26, 2022.

Under Idaho Code § 18-622, performing or attempting to perform an abortion carries criminal and administrative penalties. Idaho Code § 18-622(2). "Abortion" is defined as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with

knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child . . . .” Idaho Code § 18-604(1).

Idaho Code § 18-622 provides two affirmative defenses to criminal prosecution and disciplinary actions by licensing authorities. The first applies when a physician determines, “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” and “provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman.” Idaho Code § 18-622(3)(a). The second applies when, prior to the abortion, “the act of rape or incest [has been reported] to a law enforcement agency” and “a copy of such report” has been provided to the physician who will perform the abortion. *Id.* § 18-622(3)(b). Section 18-622 is not violated if medical treatment provided to a pregnant woman by a health care professional “results in the accidental death of, or unintentional injury to, the unborn child.” *Id.* § 18-622(4).

III. Post-*Dobbs* Developments

On the day the Supreme Court released the *Dobbs* decision, the President remarked that his administration would take immediate action to counteract *Dobbs*.[3] A subsequent executive order required the Department of Health and Human Services (HHS) to consider updates to guidance regarding emergency conditions and stabilizing care.[4] HHS through CMS released

[3] *Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade*, THE WHITE HOUSE (June 24, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/06/24/remarks-by-president-biden-on-the-supreme-court-decision-to-overturn-roe-v-wade/.

[4] *Protecting Access to Reproductive Healthcare Services*, Exec. Order No. 14076, 87 Fed. Reg. 42053-54 (July 8, 2022), https://www.federalregister.gov/documents/2022/07/13/2022-15138/protecting-access-to-reproductive-healthcare-services.

guidance suggesting that state laws prohibiting abortion but not including an exception for the life and health of the pregnant person were preempted.[5] Approximately three weeks later, the United States filed this suit.[6]

LEGAL STANDARDS

Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). A plaintiff seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) likely irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities weighs in favor of an injunction; and (4) that an injunction is in the public interest. *See id.* at 20. Because the government is a party, the last two factors are analyzed together. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

Under a preemption claim, a party pursuing a facial challenge "must show that 'no set of circumstances exists under which the Act would be valid.'" *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) (citing *United States v. Salerno*, 481 U.S. 739, 746(1987)). Such a showing is a "high bar" that the plaintiff must overcome. *Id.*

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[5] *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss*, CENTERS FOR MEDICARE & MEDICAID SERVICES (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-Hospitals.pdf (last visited Aug. 16 2022); *see also* Letter to Health Care Providers, SECRETARY OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf (last visited Aug. 16, 2022).

[6] *FACT SHEET: President Biden Issues Executive Order at the First meeting of the Task Force on Reproductive Healthcare Access*, THE WHITE HOUSE (Aug. 3, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/03/fact-sheet-president-biden-issues-executive-order-at-the-first-meeting-of-the-task-force-on-reproductive-healthcare-access-2/.

ARGUMENT

This memorandum primarily focuses on whether the United States has established a likelihood of success with respect to a facial challenge to Idaho Code § 18-622 and whether the remaining *Winter* factors warrant a preliminary injunction. Plainly, it does not.

But Idaho is constrained to note that the complaint raises other questions of significant import that eventually may require resolution. First, does the Supremacy Clause create a right of action in the United States? Judicial attention to this issue subsequent to *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), is sparse and conclusory. *See United States v. Texas*, 557 F. Supp. 3d 810, 820 (W.D. Tex. 2021). Here, EMTALA creates a detailed remedial scheme for its enforcement by the federal government, 42 U.S.C. § 1395dd(d), and implication of a separate Supremacy Clause right of action is unnecessary. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 289-90 (2001) (noting statutory enforcement provisions countered against implied right of action).

Next, if no such right of action exists, does the United States have Article III or prudential standing? The complaint alleges the injury that Section 18-622 purportedly will visit upon physicians and their patients when they are under the provisions of EMTALA, Compl. (Dkt. 1) ¶¶ 44-46, but fails to explain how it has third-party standing to redress that hypothetical injury. As the U.S. Supreme Court explained in *Kowalski v. Tesmer*, 543 U.S. 125 (2004), "[w]e have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties'" with the narrow exception in circumstances where "the party asserting the right has a 'close' relationship with the person who possesses the right" and where "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.* at 129-30 (citation omitted). Physicians, of course, can represent their own interests if prosecuted under Section 18-622 or through a pre-enforcement challenge if they face an

imminent threat of prosecution or professional discipline. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). A patient injured by a hospital's violation of EMTALA has a damages remedy under the statute, 42 U.S.C. § 1395dd(d)(2), and/or a malpractice suit under state law. *Bryant*, 289 F.3d at 1166. Given these remedies, the United States lacks third-party standing.

Last, the complaint alleges that the United States "has an interest in protecting the integrity of the funding it provides under Medicare and ensuring that hospitals who are receiving Medicare funding will not refuse to provide stabilizing treatment to patients experiencing medical emergencies." Dkt. 1 ¶ 49. No doubt this is at least partially true. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 676 (2012) (Ginsburg, J., dissenting in part). But, here, the complaint does not allege that Idaho operates a hospital emergency department to which EMTALA applies. In fact, Idaho's sole State-operated hospital participating in Medicare lacks an emergency department. Randy Rodriquez Decl. Under these circumstances, it defies common sense to argue that Idaho has violated some contract-like commitment by adopting Section 18-622. The requisite injury-in-fact for Article III standing on a Medicare-contract theory is absent.

For present purposes, however, it is enough to defeat the United States' motion to apply straightforward, settled facial challenge principles. To the extent that the United States argues that compliance with both EMTALA's stabilization requirement and Section 18-622 is impossible, its own expert declarations tell a different story. Many EMTALA abortions are necessary to save the mother's life. The "impossibility" prong of conflict preemption is thus not satisfied. To the extent that the United States argues that mere possibility of prosecution under Section 18-622 will chill the willingness of physicians to provide abortions "to stabilize" a patient, it ignores the heavy burden placed on it to show a "direct[] conflict[]" with an EMTALA "requirement" (42 U.S.C.

§ 1395dd(f)) that warrants preemption of an otherwise valid state law—and especially one that implicates Idaho's core police power to regulate both abortion and the practice of medicine.

I. The United States Has Not Established a Likelihood of Success in Its Facial Challenge to the Application of Idaho Code § 18-622 to EMTALA-Covered Abortions

A. The United States' Facial Preemption Challenge to Idaho Code § 18-622 Fails

The United States contends that Idaho Code § 18-622 "conflicts with EMTALA by subjecting physicians to criminal prosecution for terminating *any* pregnancy, irrespective of the medical circumstances." Mem. In Supp. Of Mot. For a Prelim. Inj. (Dkt. 17-1), at 8. Unraveled, this conflict preemption claim has two independent prongs: the statute, in material part, (1) makes the performance of an abortion (as defined in Idaho Code § 18-604(1)) unlawful and (2) imposes criminal liability on the performing physician unless (s)he "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." The first alleged defect arises because EMTALA "does not exempt any particular treatment (abortion or otherwise) from the ambit of stabilizing treatment" and "any contrary interpretation—i.e., that a hospital need not perform an abortion even when medically necessary to stabilize an emergency medical condition—would undermine EMTALA's overall purpose of ensuring 'that patients . . . receive adequate medical emergency care.'" Dkt. 17-1, at 11. The second alleged defect arises because "[r]elegating any exception from criminal liability to an affirmative defense ... poses an obstacle to EMTALA's 'overarching purpose of ensuring that patients . . . receive adequate emergency medical care,'" and "will render physicians less inclined or entirely unwilling to risk providing treatment." Dkt. 17-1, at 16.[7]

[7] The United States additionally asserts that "the Idaho law conflicts with EMTALA by threatening the licenses of medical professionals who perform or assist in providing an abortion." Dkt. 17-1, at 16. This assertion similarly posits Section 18-622 "deters medical professionals from

The United States thus mounts a facial challenge to Section 18-622 with respect to any abortion performed to stabilize a medical emergency subject to EMTALA—even those when the abortion is necessary to save the mother's life. *See* Dkt. 17-1, at 20 (proposing an order "that the State of Idaho—including all of its officers, employees, and agents—[should be preliminarily enjoined] from enforcing Idaho Code § 18-622(2)-(3) as applied to EMTALA-mandated care.[8] As the Supreme Court stated in *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), "[t]he important point [for facial challenge status] is that plaintiffs' claim and the relief that would follow ... reach beyond the particular circumstances of these plaintiffs" or, in this case, the particular circumstances of an abortion. And so even though the United States' brief at times uses "as-applied," Dkt. 17-1, at 2, 7, 20, it is apparent it alleges a conflict in all instances in which both EMTALA and Section 18-622 apply, and thus brings a facial challenge.

"[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) (Although "*Salerno's* applicability in preemption cases is not entirely clear[,] ... [w]ithout more direction, we have chosen to continue applying *Salerno*."). This daunting standard reflects the fact that "[f]acial challenges are disfavored" because, *inter alia*, "they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records[]'" and "threaten to short circuit the democratic process by preventing

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participating in medically necessary abortions, contrary to EMTALA's 'overarching purpose of ensuring that patients . . . receive adequate emergency medical care[.]'" *Id.* at 17.

[8] Section 18-622(3) establishes an affirmative defense for pregnancies resulting from rape or incest. The United States does not address that subsection discretely in its preemption argument.

laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 450-51; *see Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) ("We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop.").

1. Section 18-622 and the Stabilization Requirement

The United States' declarants give both hypothetical and anecdotal examples of when the performance of an abortion to effect EMTALA-required stabilization was or would be medically appropriate. For example, Dr. Lee Fleisher provides generalized examples of illness that could jeopardize a pregnant woman's life or her health. Fleisher Decl. (Dkt. 17-3) ¶¶ 13 (ectopic pregnancy), 15 (pulmonary hypertension or embolism/severe heart failure), 17 (pre-eclampsia), 19 (uterine infection), 21 (placental abruption)). But the illnesses he references are those where a doctor could exercise good faith medical judgment to determine that the patient's life was in danger. *See* White Decl. ¶¶ 2-7 (explaining that ectopic pregnancy, ¶ 3; heart failure, ¶ 4; severe preeclampsia, ¶ 5; life-threatening infection, ¶ 6; and placental abruption accompanied by uncontrolled bleeding, ¶ 7; are all conditions, under the asserted facts, in which Dr. White could make a good faith medical judgment that an abortion was necessary to prevent the death of the pregnant woman). Further, despite Dr. Fleisher's decades of experience as a physician, he does not provide any specific examples of instances where a patient was suffering a non-life-threatening emergency medical condition under EMTALA that required an abortion. Significantly, Dr. Fleisher's discussions of the medical conditions that he identified often reference that a physician would have taken other measures first to control the patient's symptoms, such as antibiotics or

blood pressure support, and that it is after these measures have been unsuccessful that the abortion became necessary to prevent the reasonably probable outcome of death. Dkt. 17-3 ¶¶ 15, 17, 19. Hence, the United States fails to establish that even when a pregnant patient presents with one of these conditions that an abortion is always necessary; it will depend on the patient's condition and circumstances and responses to treatment.

The supporting declarations from the Idaho physicians also conclude that in the circumstances presented an abortion was necessary because of the high risk of death or to preserve or protect her life. Corrigan Decl. (Dkt. 17-6) ¶¶ 15, 22, 23, 28; Cooper Decl. (Dkt. 17-7) ¶¶ 7, 9, 11; Seyb Decl. (Dkt. 17-8) ¶¶ 8, 10, 12. Dr. Corrigan's declaration provides examples of three "Jane Doe" patients who required emergency abortions. Dkt. 17-6 ¶¶ 9-30. Jane Doe 1 suffered a "risk of life-threatening . . . infection," *id.* ¶ 11, and the termination of Jane Doe 1's pregnancy was "necessary" to "preserve her life." *Id.* ¶ 15. For Jane Doe 2, "the risk of her death . . . was imminent[.]" *Id.* ¶ 23. Jane Doe 3 suffered a "dangerous pregnancy complication that can result in serious and potentially fatal complications" carrying "a high risk of maternal and fetal death." *Id.* ¶¶ 27-28. As Dr. Corrigan explained, all of these examples are dire cases where the abortion was necessary to preserve the life of the pregnant woman. These cases simply do not fall within a zone of conflict between Section 18-622 and EMTALA. So, too, Drs. Cooper's and Seyb's declarations contain anecdotal "Jane Doe" examples, and each patient suffered from life-threatening conditions, with an abortion necessary to preserve her life. Dkt. 17-7 ¶¶ 6-11; Dkt. 17-8 ¶¶ 7-13. Dr. Seyb asserts in his declaration that he and his colleagues encounter such "pregnancy-related emergencies approximately a dozen times per year." Dkt. 17-8 ¶ 6. But if the examples cited in the United States' declarations are representative samples, those cases—dire as they may be—are simply not cases where Section 18-622 conflicts with EMTALA. In short, the United States merely

identifies circumstances when stabilizing treatment necessitated by EMTALA includes an abortion. However, it fails to articulate or establish an example where the Idaho statute makes that abortion unlawful. Rather, the medical doctors have given their medical opinions that each abortion described was necessary to prevent death based on an evaluation of the circumstances and the unsuccessful measures that were attempted. The United States itself thus negates the supposed conflict between EMTALA and Section 18-622 in myriad real-life medical emergencies.

Notably, these scenarios, and the medical opinions rendered about them, are inherently fact-based (as is expressly recognized in Section 18-622), which disagreements about appropriate medical care inherently are. Therefore, it is unsurprising that litigation over the application of the EMTALA stabilization mandate has arisen only in as-applied contexts, with a focus on whether a hospital or physician provided "medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility[.]" 42 U.S.C. § 1995dd(e)(3)(A). The Sixth Circuit accordingly has held that "the word 'stabilized' is defined, but the definition is not given a fixed or intrinsic meaning. Its meaning is purely contextual or situational. The definition depends on the risks associated with the transfer and requires the transferring physician, faced with an emergency, to make a fast on-the-spot risk analysis." *Cherukuri v. Shalala*, 175 F.3d 446, 449–50 (6th Cir. 1999). In sum, a claim that Section 18-622 conflicts with the stabilization mandate is only appropriate for an as-applied, not a facial, challenge, if one were even to arise. *See Matter of Baby "K,"* 16 F.3d 590, 597 (4th Cir. 1994) (State statute exempting a physician from providing care deemed medically or ethically inappropriate did "not allow the physicians treating Baby K to refuse to provide her with respiratory support.")

2. Criminal Liability and Good-Faith Medical Judgment Affirmative Defense

The United States' facial challenge to the criminal liability provisions in Section 18-622(2) and (3) similarly fails but for different reasons. Unlike many federal statutes, EMTALA not only specifically addresses the issue of preemption but also saves from preemption "any State or local law requirement, except to the extent that the requirement *directly conflicts* with a requirement of this section." 42 U.S.C. § 1395dd(f) (emphasis added). The Ninth Circuit has issued binding instructions on how to construe this savings provision.

"When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993) (per curiam). This Court therefore must "look only to this language and construe its preemptive effect as narrowly as possible." *Id.* (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)). As for Section 1395dd(f), "[t]he key phrase is 'directly conflicts.' A state statute directly conflicts with federal law in either of two cases: first, if 'compliance with both federal and state regulations is a physical impossibility ... or second, if the state law is 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citations omitted).

Here, the United States argues that the mere *possibility* of prosecution for an abortion performed for stabilization purposes, together with "the affirmative defense structure *itself*," Dkt. 17-1, at 15, gives rises to an impermissible obstacle because such possibility will chill the willingness of physicians (or assisting medical professionals) to provided EMTALA-covered services. This argument should be rejected for at least three reasons.

First, the EMTALA savings provision demands a "direct[] conflict[]" with an EMTALA "requirement." As demonstrated above, and confirmed in the declaration of Dr. White, there is no direct conflict in factual scenarios presented by the United States. A physician can satisfy EMTALA's requirement to provide the necessary stabilization and avoid liability under Section 18-622 because the abortion was also necessary to prevent death. Furthermore, the United States identifies no other "requirement." Rather, the United States characterizes it as a conflict with "EMTALA's 'overarching purpose of ensuring that patients ... receive adequate emergency medical care[.]'" But as the Ninth Circuit has recognized in another context, "[w]e may not interpret a saving clause as preserving a state law that would so conflict and interfere with a federal enactment that it would defeat the federal law's purpose or essentially nullify it." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 959 F.3d 1201, 1214 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 521 (2021). The United States' abortion-centric argument mischaracterizes EMTALA's specific objective of preventing hospitals from dumping medically unstable patients (through discharge or transfer to another medical facility) because they were unable to pay. *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1255 (9th Cir. 1995). The range of emergency room services subject to EMTALA is immense, and as shown above, may even include abortions. To suggest that Section 18-622 would "essentially nullify" the federal law is thus no more than rhetorical flourish.

Second, it is settled that "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (cleaned up). Regulation of the medical profession has long been recognized

as a quintessential state area of concern. *E.g.*, *Hawker v. New York*, 170 U.S. 189, 192-93 (1898) ("No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power."). As was abortion prior to *Roe v. Wade*, 410 U.S. 113 (1973). *See Dobbs*, 142 S. Ct. 2228, 2256 (2022) (noting that prior to *Roe* every single state had a law criminalizing abortion). Consequently, construing "any State . . . requirement" in Section 1395dd(f) to exclude generally applicable abortion statutes ignores this established tradition of deference to the state police power. The remedy for any alleged inconsistency between such a statute and EMTALA's stabilization mandate is an as-applied, not a facial, challenge by a physician.

Third, the United States' "chilling" preemption argument ignores the fact that EMTALA does not foreclose state law-based personal injury suits against physicians for allegedly negligent emergency room care. *See, e.g.*, *Harry v. Marchant*, 291 F.3d 767, 773 (11th Cir. 2002) ("EMTALA was not intended to establish guidelines for patient care, to replace available state remedies, or to provide a federal remedy for medical negligence."). It is hardly reasonable to argue that such civil remedies may not have a deterrent impact on the willingness of physicians to perform emergency room procedures—which often demand "a fast on-the-spot risk analysis." *Cherukuri*, 175 F.3d at 450. The United States' chilling argument, in short, proves too much.[9]

[9] The facial conflict-preemption claim predicated on possible loss of licensure by any health care professional "who assists in performing or attempting to perform [a criminal] abortion," Idaho Code § 18-622(2), fails for those reasons discussed immediately above. The United States simply cloaks its policy dissatisfaction with this aspect of the statute, and the speculative chilling effect provides no basis for finding that the provision would "essentially nullify" EMTALA's goal of eradicating "patient dumping."

In total, the United States fails to meet its burden to show on its facial challenge that no set of circumstances exists under which Section 18-622 can be lawfully applied. *Wash. State Grange,* 552 U.S. at 449. In fact, it has done the opposite and shown many circumstances in which EMTALA and Idaho's law can operate without conflict. Section 18-622 neither defeats nor nullifies EMTALA's purpose of ensuring that patients receive stabilizing care for an emergency medical condition, including those involving complications to pregnancy. The first, and most important, of the *Winter* factors weighs heavily in Idaho's favor.

II. Lack of Irreparable Harm

The United States first contends that "allowing the Idaho law to go into effect would threaten severe harm to pregnant patients in Idaho." Dkt. 17-1, at 17. But this assertion does not show irreparable harm to the United States. Nor does Idaho Code § 18-622 threaten harm to Idaho's pregnant women, as the examples provided by the United States' declarations from Drs. Corrigan, Cooper, and Seyb identified situations for which a doctor may exercise good faith medical judgment to determine that an abortion is necessary to preserve the life of the pregnant woman. The Idaho statute does not deprive persons coming to the emergency department "critical emergency care." Indeed, the United States identified approximately 100 cases of ectopic pregnancies in Idaho receiving *Medicaid* covered treatment, but it did not say how many of those were treatments subject to EMTALA; how many of those treatments were abortions; and why the abortions would not be covered under Idaho Code § 18-622's affirmative defense, given that ectopic pregnancy puts a "patient's life in jeopardy . . . and in the vast majority of cases [will] cause . . . potentially fatal internal bleeding." Dkt. 17-3 ¶ 13.

The United States asserts that "emergency medical conditions will occur for a sizeable number of pregnant patients within Idaho." Dkt. 17-1, at 18. It further speculates that physicians

will be discouraged "from providing necessary care in emergency situations." *Id.* It even asserts that "there is a likelihood that some pregnant [women] suffering medical emergencies will face irreversible health consequences," *id.*, but as discussed above, the examples provided by its doctors all fall within Idaho Code § 18-622's good faith medical judgment that abortion was necessary to prevent the death of the pregnant woman. The United States admits this point in just one of many examples (illustrating again why the facial challenge fails), where Dr. Corrigan determined that "termination [of the pregnancy] was necessary to preserve [the woman's] life." Dkt. 17-1, at 19.

Further, one fact that should be reiterated is that EMTALA's scope is narrow—it applies when a person "comes to the emergency department" and ends upon the hospital's provision of the stabilizing treatment or transfer. 42 U.S.C. § 1395dd(a)-(c). EMTALA does not apply to inpatients or outpatients; nor does EMTALA apply outside the context of hospital emergency room treatment—e.g., EMTALA does not apply to an abortion clinic. For this reason, the United States' attempts to assert "injury" unrelated to its claim under EMTALA does not show the need for a preliminary injunction.

III. Balance of the Equities and the Public Interest

The United States next contends its sovereign interest is harmed by Idaho regulating abortion—even though the U.S. Supreme Court concluded states were authorized to do just that. Dkt. 17-1, at 19. It says that Idaho is disrupting the Medicare program and depriving the United States of the benefits of its bargain with hospitals. *Id.* Not so. Idaho is regulating abortion through a criminal statute of general applicability, just as it regulates other aspects of offenses that it deems inimical to the public interest. Conversely, it is not regulating Medicare or the hospitals'

participation in Medicare.[10] And contrary to the United States' claim, Idaho is not prohibiting hospitals from "performing EMTALA-mandated services." *Id.*

Each sovereign operates within its own sphere of responsibility, and if Idaho attempts to invade the area marked out by EMTALA in a particular instance, an aggrieved party has recourse to challenge that alleged overreach. The mere fact that such a dispute may arise in the future does not establish some equitable entitlement to an injunctive net that captures a broad range of entirely lawful state conduct. The equities here are thus evenly balanced, with both governments rightly insisting on preserving their legitimate sovereign interests.

The United States' next contention, that the Idaho law interferes with the provider agreements with the 52 hospitals (although the United States admits only 39 have emergency departments), fares no better. *Id.* at 20. Idaho is not interfering with any terms of the agreements between the hospitals and the United States, as Idaho has simply exercised its police power to regulate abortion. Nothing in the text of Idaho Code § 18-622 purports to interact or interfere with hospitals' provider agreements with the United States.

And here, contrary to the United States' argument, it would be Idaho that would be injured if it were prevented, even in the narrow circumstances of EMTALA, from effectuating the statute enacted by its representatives of the people. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Rehnquist, J., in chambers). Post-*Dobbs,* the balance of equities and public interest clearly lie in

[10] In fact, given that approximately $3.4 billion in Medicare funds went to Idaho hospitals between fiscal years 2018-2020, Dkt. 17-1, at 6, the United States' position that Idaho must alter *its* policy in favor of the United States' policy or have the hospitals risk such funds raises serious concerns that EMTALA's required stabilizing treatment, as interpreted by the United States and expressed in this litigation, is invalid as coercive spending clause legislation. *See Nat'l Fed. of Indep. Buss. v. Sebelius*, 567 U.S. 519, 575-87 (2012). This reason raises another point as to why the United States is not likely to succeed on the merits. But as discussed above, this memorandum focuses primarily on whether there is a direct conflict between the EMTALA and Idaho Code § 18-622, which there is not.

allowing Idaho to regulate abortion as its elected representatives determine best suit the citizenry. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'").

CONCLUSION

For these reasons, the United States' motion for a preliminary injunction should be denied.

DATED this 16th day of August, 2022.

OFFICE OF THE ATTORNEY GENERAL

By: */s/ Brian V. Church*
STEVEN L. OLSEN
MEGAN A. LARRONDO
BRIAN V. CHURCH
ALAN W. FOUTZ
INGRID C. BATEY
Deputy Attorneys General

CLAY R. SMITH
JOAN E. CALLAHAN
Special Deputy Attorneys General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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

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

Attorney for Amici States California, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota,

DANIEL W. BOWER
Morris Bower & Haws PLLC
dbower@morrisbowerhaws.com

MONTE NEIL STEWART
Attorney at Law
monteneilstewart@gmail.com

Attorneys for Intervenors-Defendants

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

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

JACOB M. ROTH
Jones Day
jroth@jonesday.com

AMANDA K. RICE
Jones Day
arice@jonesday.com

Attorneys for Amici Curiae The American Hospital Association and the

Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Washington, D.C.

Association of American Medical Colleges

SHANNON ROSE SELDEN
Debevoise & Plimpton LLP
srselden@debevoise.com

ADAM B. AUKLAND-PECK
Debevoise & Plimpton LLP
Aaukland-peck@debevoise.com

LEAH S. MARTIN
Debevoise & Plimpton LLP
lmartin@debevoise.com

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

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Registered Participant via email:

CHARLOTTE H. TAYLOR
Jones Day
ctaylor@jonesday.com

/s/ Brian V. Church
BRIAN V. CHURCH
Deputy Attorney General

No. 23-35153

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF IDAHO,

Defendant,

and

THE SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, MIKE MOYLE; IDAHO STATE SENATE PRESIDENT PRO TEMPORE, CHUCK WINDER; AND THE SIXTY-SEVENTH IDAHO LEGISLATURE

Defendants-Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
No. 1:22-cv-00329-BLW • Hon. B. Lynn Winmill

APPELLANT'S EXCERPTS OF RECORD VOLUME 3 of 3

Daniel W. Bower, ISB #7204
Morris Bower & Haws PLLC
1305 12th Avenue Road
Nampa, Idaho 83686
Telephone: 208-345-3333
dbower@morrisbowerhaws.com

Monte Neil Stewart, ISB #8129
11000 Cherwell Court
Las Vegas, Nevada 89144
Telephone: 208-514-6360
monteneilstewart@gmail.com

Attorneys for Defendants-Intervenors-Appellants
THE SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, MIKE MOYLE; IDAHO STATE SENATE PRESIDENT PRO TEMPORE, CHUCK WINDER; AND THE SIXTY-SEVENTH IDAHO LEGISLATURE

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 Intervenor-Defendants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant,

and

SCOTT BEDKE, 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-SIXTH IDAHO LEGISLATURE,

Intervenor-Defendants.

Case No. 1:22-cv-00329-BLW

IDAHO LEGISLATURE'S BRIEF IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR PRELIMINARY INJUNCTION

The Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively the "Legislature") respectfully submit this brief in opposition to the Government's Motion for Preliminary Injunction (Dkt. 17).

RESPONSIVE DISCUSSION

I. Introduction

The preeminent issue here is one of fact, whether in the real world EMTALA[1] actually conflicts with the 622 Statute.[2] In other words, does EMTALA ever require Idaho medical professionals to perform a medical procedure prohibited by the 622 Statute? Section II below addresses that factual question and makes clear that the answer is "no." That factual question, of course, presupposes that each of EMTALA and the 622 Statute is being given a correct reading and accorded its proper and actual scope. Section III below addresses that subject.

The Complaint (Dkt. 1)—as well as the United States Attorney General's press conference accompanying its filing—presented to the American public a picture of wide and deep conflict and therefore a civil action of wide scope and consequence, one that would enable the performance of hundreds and hundreds of abortions otherwise prohibited by the 622 Statute.[3] False picture. As the volume of a large stock-water trough is to the volume of a thimble, so is the scope of the Complaint's false picture to the scope of what is really at stake here. And worse, the thimble is

[1] 42 U.S.C. § 1395dd.
[2] Idaho Code § 18-622.
[3] Opponents of the 622 Statute, like Planned Parenthood, like to refer to it as the "Total Abortion Ban," a phrase that this Court itself used in its Order ruling on the Legislature's Motion to Intervene. Dkt. 27 at P. 2. A respect for accuracy (and an aversion to Orwellian labels) will lead to rejection of that phrase, especially by this Court. The 622 Statute clearly does not ban all abortions and clearly does not criminalize emergency medical procedures undertaken to preserve the life of the mother even though the death of the preborn child is thereby made certain.

empty; the Government has not shown and cannot show *any* real-world cases where medical procedures supposedly required by EMTALA will not take place unless this Court grants the Government its requested injunctive relief.

The Government uses five mechanisms to present this case as being of much wider scope and consequence than it really is. One, it deems treatment of ectopic "pregnancies" to be abortions within the scope of the 622 Statute. This was a clumsy and unseemly blunder on the Government's part (although the motivation for it is clear). As the Legislature's Reply re Intervention, Dkt. 25 at P. 2 said: "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.) That Reply went on to show that the Government almost certainly knew that it was working a deception. *Id*. at 2-3. And, as Dr. Reynolds says in her declaration: "Termination of an ectopic pregnancy is not an abortion and no competent physician would deem it to be such. It is therefore not prohibited by the 622 Statute. Any effort to redefine abortion to include treatment of ectopic pregnancies is medically baseless and, in my judgment, inexcusable." *See* Declaration of Tammy Reynolds, M.D. ("Reynolds Declaration") at ¶ 12. Section II. A. below exposes this first misleading mechanism for what it is.

Two, directly through the testimony of the three Idaho doctor-declarants used by the Government (and indirectly through the testimony of its Pennsylvania doctor-declarant), the Government attempts to show that a not insubstantial number of pregnancy-related medical emergencies in Idaho require, under EMTALA, emergency medical treatment that will result in loss of the preborn child's life but that the 622 Statute prohibits. This attempt fails. The declarations of Drs. French and Reynolds establish quite clearly that the Government's presentation is premised on the warping of both medical realities and the proper scope and understanding of EMTALA and

the 622 Statute. Indeed, the French and Reynolds declarations establish quite conclusively that the Government has failed to present any credible evidence of any pregnancy-related medical emergencies in Idaho requiring, under EMTALA, emergency medical treatment that will result in loss of the preborn child's life but that the 622 Statute prohibits. Section II. B. below exposes the fatal defects in the Government's second misleading mechanism.

Three, the Government predicts, as if such were a present reality, the rather absurd idea that this State's prosecuting attorneys will in effect zealously second-guess the judgment of the medical professionals providing emergency medical treatment to pregnant women and thereby bring prosecutions against those involved whenever the treatment is related to the death of the preborn child—and do so as a matter of course, if not automatically. The declaration of Prosecuting Attorney Bryan Taylor debunks that absurd and misleading notion. Section II. C. below fully exposes this third misleading mechanism for what it is.

Four, the Government speaks of there being only two affirmative defenses to a prosecution making a *prima facie* showing of a violation of the 622 Statute in the context of emergency medical treatments—good-faith medical judgment that the treatment was necessary to prevent the death of the pregnant woman and reported rape or incest. But of course, there is a third defense—that the 622 Statute is unconstitutional under the Supremacy Clause and preemption doctrines to the extent it operates to prohibit or interfere with EMTALA's mandate. That is the Government's claim here, and its filings suggest the Government's strong belief that its claim is a slam dunk. If it is that, the Government's "factual" presentations about "fears of prosecution" and "chilling effects on medical judgments" must be adjudged misleading at best. No further elaboration is required to show this fourth misleading mechanism for what it is.

The Government's fifth misleading mechanism brings us back to what we said before, that attention to the key factual question presupposes that each EMTALA and the 622 Statute is being given a correct reading and accorded its proper and actual scope. The Government tries to subvert that presupposition. It constantly and without warrant tries to expand EMTALA's supposed scope, to minimize and distort the 622 Statute's language limiting its own scope, and thereby to expand the scope of the 622 Statute's prohibition. All this for the purpose of fabricating a conflict that does not exist but without which the Government has no case, let alone grounds for the exercise of this Court's extraordinary equitable powers. As noted, Section III below corrects this fifth misleading mechanism.

These are the Government's five mechanisms used to paint its false picture about a supposed actual "conflict" and hence about the scope and consequence of its case against Idaho.

What is really at stake amounts to the content of a thimble. The Government must say (and has tried to show but has failed to do so) that the thimble is full. We say and have shown with not just admissible but credible evidence that the thimble is empty. The thimble is empty if all it contains is the *concept* of Relevant Abortions; it has some real content to the extent, but only to the extent, that Relevant Abortions occur in Idaho. And the law is clear that this Court can issue an injunction against the 622 Statute's operation in that very small realm (and only in that very small realm) *only* if the thimble has something in it.

For clarity, we state here what we mean by the phrase Relevant Abortions, with this definition being a refined and improved version compared to our prior efforts. The phrase Relevant Abortions means that class of emergency medical conditions (i) where medically appropriate treatment of the mother will result in the death of the preborn child, (ii) where EMTALA requires

that treatment, but (iii) where the 622 Statute prohibits it because it is not necessary to save the life of the mother.

II. The Thimble Is Empty.

A. Treatment of an ectopic pregnancy is not an abortion.

It is hard to overstate how greatly the Government, in its effort to manufacture a conflict, relies on its erroneous characterization of the medical treatment of ectopic pregnancies as abortion and therefore within the scope of the 622 Statute's prohibition. That this characterization is erroneous is certain. We so demonstrated in our Reply in Support of the Legislature's Motion to Intervene.[4] Dr. Reynolds's testimony, quoted above, so demonstrates. And Dr. French's testimony is quite thorough in exposing the falsity of this mischaracterization.

Dr. French testifies: "I have reviewed the declaration of Dr. Lee A. Fleisher, and he uses the example of an ectopic pregnancy as a life-threatening scenario whereby an abortion is necessary to save the life of the mother. I agree that a life-saving procedure is necessary, but the life-saving surgery is *not* considered an abortion. Idaho law does not prohibit any life-saving surgery, even if it results in the death of the unborn child." *See* Declaration of Richard Scott French, M.D. ("French Declaration") at ¶ 17 (emphasis added). He goes on to explain in detail why he "would question the competence of an obstetrician who said they were going to perform an abortion on a patient bleeding out from a ruptured ectopic pregnancy." *Id*. at ¶ 18. He makes that explanation in ¶¶ 18–20, all of which leads to this conclusion at ¶ 21:

The life threat of an ectopic pregnancy is covered in 18-622(4) that specifies the health of the woman is of primary importance:

[4] Dkt. 25 at 2-3.

> Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

The only credible evidence before this Court is that the 622 Statute does not cover medical treatments for ectopic pregnancy. That being so, there is no conflict between it and EMTALA.

B. The Government has failed to show the presence of Relevant Abortions in Idaho.

The grand objective of the four doctor declarations filed by the Government (Drs. Cooper, Corrigan, Seyb, and Fleisher) is to make it appear that Relevant Abortions are not uncommon in Idaho. But the declarations of Drs. French and Reynolds put the needle to that balloon.

Dr. Reynolds testifies at ¶ 7:

> In this context, I note that none of the Jane Doe cases described in the declarations filed in this civil action by Idaho doctors Cooper, Corrigan, and Seyb constitutes a Relevant Abortion. That is so because, based on the plain language of those descriptions, each case involved an emergency medical procedure to save the life of the mother. In other words, in my opinion, each case involved a lawful medical procedure under the 622 Statute. Indeed, in my judgment and based on my experience, each case presented a situation where no informed, competent professional would second-guess the legality of the procedure.

Dr. French goes into great detail in his analysis of each of Jane Doe cases set forth in the declarations of the Government's three Idaho doctors and also into Dr. Fleisher's hypotheticals. *See* French Declaration at ¶¶ 17–29 (rebutting Dr. Fleisher's hypotheticals); *id*. at ¶¶ 30–55 (explaining and correcting the Jane Doe accounts of the three Idaho doctors). On that strong basis, he is able to provide this clear and powerful conclusion:

> I have reviewed the declarations submitted by Dr. Lee A. Fleisher, Dr. Emily Corrigan, Dr. Kylie Cooper, Dr. Stacy T. Seyb and the cases they present. In my opinion, the examples of pregnancy-related medical emergencies in these declarations are presented in a way that creates a false conflict/false dichotomy between the life and health of the mother and the life and health of the unborn child and appear to assume that under Idaho Code § 18-622, physicians will give the health and welfare of the mother less consideration than the health and welfare of the unborn child. In my experience, in the emergency situations presented in these examples and anticipated by EMTALA, the subordination of the mother's life and

> health in favor of the unborn child by a physician has not and will not occur. Further, these same physicians would never interpret Idaho Code 18-622 to mean that the mother's health and welfare are secondary to the baby. Every physician understands the Hippocratic Oath of "do no harm", and physicians certainly understand that the baby's health is dependent upon the mother's health. This is why in the tragic and rare circumstances whereby the mother dies, then a post-mortem C-section is promptly performed. Since there is no chance to save the mother, then the focus turns to the baby's health.

Id. at ¶ 9.

What we said before merits repeating: The declarations of Drs. French and Reynolds establish quite conclusively that the Government has failed to present any credible evidence of any pregnancy-related medical emergencies in Idaho requiring, under EMTALA, emergency medical treatment that will result in loss of the preborn child's life but that the 622 Statute prohibits. No Relevant Abortions, therefore no conflict between EMTALA and the 622 Statute.

Dr. Reynolds's declaration in particular teaches of the rarity of emergency medical procedures undertaken to save the life of the mother and resulting in the death of the preborn child. Reynolds Declaration at ¶¶ 3, 6. The official data fully support her declaration. The Idaho Department of Health and Welfare collects data from treating physicians on abortions where (i) the patient is under 18, (ii) the postfertilization age of the preborn child is undetermined, and (iii) the postfertilization age is over 20 weeks. That data, going back to 2007 for # 1 and 2013 for # 2 and # 3, gives these numbers for emergency medical procedures undertaken to save the life of the mother and resulting in the death of the preborn child: for # 1, one procedure since 2007; for # 2, zero since 2013; and for # 3, four since 2013. See Declaration of Pam Harder (with Exhibits A and B).

Yet more credible evidence that the thimble is empty.

C. As it will be applied by Idaho's prosecuting attorneys, the 622 Statute poses no threat of interference with any EMTALA-required medical procedure or of causing any "fears" or "chills" in any competent medical professional.

As with the treatment of ectopic pregnancies, it is hard to overstate the extent to which the Government relies on its third misleading mechanism. That mechanism is to misread (minimize) the language in the 622 Statute that limits its own scope and to misread (maximize) the scope of its prohibition—and then to *assume* that this State's prosecuting attorneys will zealously second-guess the judgment of the medical professionals providing emergency medical treatment to pregnant women and thereby bring prosecutions against those involved whenever the treatment is related to the death of the preborn child—and do so as a matter of course, if not automatically. False picture and one painted without any factual support.

We believe that the only admissible, credible evidence before this Court relevant to this third mechanism will be to this effect: When some serious medical condition exists that requires an emergency medical procedure under EMTALA, with that procedure ending the life of the pre-born child, this State's prosecuting attorneys, in the standard and ordinary exercise of their prosecutorial discretion, will not second-guess the judgments and decisions of the involved medical professionals. Indeed, they will not even seriously consider prosecuting under the 622 Statute. There is one caveat to these facts but one that helps the Government not at all: if a prosecuting attorney were to receive clear and convincing evidence that the procedure was done in bad faith, that is, as a fabricated emergency medical condition and a sham designed to evade the 622 Statute, then they will seriously consider prosecution.

We base this summary of the evidence on conversations with multiple Prosecuting Attorneys in Idaho. We believe in good faith that we will be filing a declaration from one of them by our Wednesday, August 17, 2022, noon filing deadline. We also believe in good faith that, if

this Court allows live testimony, through the use of our subpoena power this Court will hear testimony fully consistent with our summary above and none materially contrary to it.

On this basis, we respectfully submit that, yet again, the Government's picture of a conflict between EMTALA and the 622 Statute is fabricated and false, without any foundation in fact.

III. The Correct Factual and Legal Understanding of the Scope of Both EMTALA and the 622 Statute Defeats the Government's Efforts to Warp and Distort Their Scope.

A. A correct factual understanding of the scope of the two statutes, founded on the realities of emergency medicine, reveals the thimble to be empty.

Dr. Reynolds's declaration at ¶ 8 teaches that "part of a treating Ob-Gyn physician's duty of care is possession of accurate knowledge of the language and real-world application of the jurisdiction's laws regulating abortion." Dr. French's declaration demonstrates an Idaho physician's fulfillment of that duty. Dr. French provides careful analysis of the actual language of the 622 Statute, including its language limiting its own scope, and—and this is important—how in the real world of emergency medicine that language applies. This analysis appears throughout his declaration.

We have already quoted above the French Declaration at ¶ 9 where he demonstrates the error of the Government's doctors' false assumption that under the 622 Statute "physicians will give the health and welfare of the mother less consideration than the health and welfare of the unborn child." This assumption is false exactly because "in the emergency situations presented in these examples [real and hypothetical given by the Government's doctors] and anticipated by EMTALA, the subordination of the mother's life and health in favor of the unborn child by a physician has not and will not occur." *Id*. In turn, this is so exactly because "these same physicians would never interpret Idaho Code 18-622 to mean that the mother's health and welfare are secondary to the baby." *Id*.

Continuing to apply the 622 Statute in the context of real-world emergency medicine, Dr. French testifies regarding the Government doctors' real and hypothetical cases and "similar procedures in the same or similar circumstances":

> The Idaho law as written in no way precludes this life-saving procedure or other similar procedures in the same or similar circumstances. As stated in Section 18-622(4):
>
> Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

Id. at ¶ 15. *See also id*. at ¶ 21.

Turning to EMTALA, Dr. French testifies that "EMTALA is designed and intended simply to facilitate the transfer of patients to facilities that have the capacity to treat them – it is not a statute that mandates any particular type of treatment, but rather "stabilizing treatment" until the patient can be transferred." *Id*. at 10. This is important because, relative to many of the real and hypothetical cases presented by the Government's doctors, those doctors are assuming "that every hospital has the capability to take care of high-risk pregnancy cases." *Id*. Obviously, that is not true "in a rural state such as Idaho." *Id*. And here is a further error in the "scenarios presented in [the Government doctors'] declarations"—those scenarios "imply that in extreme emergency situations, the physician may be confused as to whether his or her first duty is to abort babies or save the life of the mother before transferring her to an appropriate hospital." In the real world, that confusion simply does not happen; the emergency medical providers "the most appropriate action to save the mother's life [which] is to send [her] to the closest hospital with the appropriate resources and personnel for the care of a critically ill pregnant woman." *Id*.

In ¶ 23, Dr. French goes on to explain how specific provisions of EMTALA apply when "the patient is too unstable to transport and the transferring hospital is unable to provide the proper

medications or treatments necessary to 'stabilize' the patient." One provision limits the hospital's EMTALA obligation to provide such screening and treatment as may be within the resources of "'the staff and facilities available at the hospital.' (42 U.S.C. § 1395dd(b)(1)(a).)" *Id.* The second provision provides that EMTALA does not prohibit the transfer of an unstable patient upon a particular medical judgment: when, "based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer." This language is from 42 U.S.C. § 1395dd(c)(1)(A)(ii). *Id*. These EMTALA provisions, which Idaho emergency medical providers apply routinely, show the unworldly, unrealistic nature of one of Dr. Fleisher's key hypothetical examples. *Id*. at ¶ 22.

All this careful analysis of the correct meaning and application of EMTALA and the 622 Statute in the real world sustains Dr. French's key conclusion that "in the emergency situations presented [by the Government's doctors] . . . and anticipated by EMTALA, the subordination of the mother's life and health in favor of the unborn child by a physician *has not and will not occur*." *Id.* at ¶ 9 (emphasis added). "Further, these same physicians would *never* interpret Idaho Code 18-622 to mean that the mother's health and welfare are secondary to the baby." *Id*. (emphasis added).

The true picture presented by Dr. French is a much-needed antidote to the Government's misleading picture of a state law of draconian reach wreaking havoc in the world of emergency medicine (the 622 Statute) and of a federal law that has as its purpose and effect—surprise—rolling back *Dobbs*' restoration to the States of their Tenth Amendment right, power, and authority to regulate abortion, including the making of all the hard moral decisions that right, power, and

authority require. Attention to Dr. French's analysis leads to the confident conclusion that, instead of havoc, there is harmony. Certainly, there is no conflict between EMTALA and the 622 Statute.

So, yes, as a matter of fact, the thimble is empty.

B. A correct legal understanding of the scope of the two statutes, especially EMTALA, also reveals the thimble to be empty.

We have in hand a thorough-going analysis of the law governing any invocation and application of EMTALA. That analysis demonstrates that the Government's invocation and application of EMTALA here are accurately seen as wrong and abusive. Because of this Court's currently in-place order limiting the Legislature to fact issues and precluding it from making legal arguments, we cannot present that analysis in this brief and can only hope that the Attorney General's Office adequately mirrors what we have in hand (which we have shared with it).

Our legal analysis demonstrates that:

1. EMTALA does not preempt the 622 Statute expressly.
2. EMTALA does not impliedly preempt the 622 Statute.
3. The Government's interpretation of EMTALA conflicts with serious constitutional doctrines.
   a. As read by the Government, EMTALA poses serious separation-of-powers conflicts because of the statute's deprivation of state authority affirmed by the United States Supreme Court in *Dobbs*.
   b. As read by the Government, EMTALA poses serious concerns that it violates the Major Questions Doctrine.
   c. As read by the Government, EMTALA poses serious concerns that it violates the limits of the Spending Clause.

In the event this legal analysis is not adequately presented to the Court in defense of the 622 Statute, we will promptly accept this Court's prior invitation to seek a modification of the existing limits on the scope of the Legislature's intervention so as to be able to present the legal analysis to this Court.

Dated this 16th day of August, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Proposed Intervenors-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 2022, 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
950 Pennsylvania Avenue NW
Washington, DC 20530
Email: brian.netter@usdoj.gov

Attorneys for Plaintiff

Daniel Schwei
DOJ-Civ
Federal Programs Branch
1100 L St NW, Ste 11532
Washington, DC 20530
Email: daniel.s.schwei@usdoj.gov

Attorneys for Plaintiff

Julie Straus Harris
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20530
Email: julie.strausharris@usdoj.gov

Attorneys for Plaintiff

Lisa Newman
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
Email: lisa.n.newman@usdoj.gov

Attorneys for Plaintiff

Anna Lynn Deffebach
DOJ-Civ
Civil Division- Federal Programs Branch
1100 L ST NW
Ste Lst 12104
Washington, DC 20005
Email: anna.l.deffebach@usdoj.gov

Attorneys for Plaintiff

Christopher A. Eiswerth
DOJ-Civ
Federal Programs Branch
1100 L Street, NW
Ste 12310
Washington, DC 20005
Email: christopher.a.eiswerth@usdoj.gov

Attorneys for Plaintiff

Emily Nestler
DOJ-Civ
1100 L Street
Washington, DC 20005
Email: emily.b.nestler@usdoj.gov

Attorneys for Plaintiff

Brian V Church
Dayton Patrick Reed
Ingrid C Batey
Megan Ann Larrondo
Steven Lamar Olsen
Office of the Attorney General
954 W. Jefferson St., 2nd Floor
P.O. Box 83720
Boise, ID 83702-0010
Email: brian.church@ag.idaho.gov
dayton.reed@ag.idaho.gov
ingrid.batey@ag.idaho.gov
megan.larrondo@ag.idaho.gov
steven.olsen@ag.idaho.gov

Attorneys for Defendant

Wendy J. Olson
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702-7705
Email: wendy.olson@stoel.com

Jacob M. Roth *(pro hac vice)*
Charlotte H. Taylor *(pro hac vice)*
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Email: ctaylor@jonesday.com
yroth@jonesday.com

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

Amanda K. Rice *(pro hac vice)*
JONES DAY
150 West Jefferson, Suite 2100
Detroit, MI 48226-4438
Email: arice@jonesday.com

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

Shannon Rose Selden *(pro hac vice)*
Leah Martin *(pro hac vice)*
Adam Aukland-Peck *(pro hac vice)*
DEBEVOISE &PLIMPTON LLP
919 Third Ave.
New York, NY 10022
Email: srselden@debevoise.com
lmartin@debevoise.com
aauklandpeck@debevoise.com

Attorneys for Amici

Jeffrey B. Dubner *(PHV forthcoming)*
Skye L. Perryman *(PHV forthcoming)*
John T. Lewis *(PHV forthcoming)*
Maher Mahmood *(PHV forthcoming)*
DEMOCRACY FORWARD FOUNDATION
655 15th St. NW, Ste 800
Washington, D.C. 20005
Email: jdubner@democracyforward.org
sperryman@democracyforward.org
jlewis@democracyforward.org
mmahmood@democracyforward.org

Attorneys for Amici

/s/ Daniel W. Bower
Daniel W. Bower

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 Proposed Intervenors-Defendants

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 IDAHO LEGISLATURE'S REPLY TO THE UNITED STATES' RESPONSE TO ITS MOTION TO INTERVENE [DKT. 15]**

The Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively the "Legislature") respectfully submit this reply brief in support of their Motion to Intervene (Dkt. 15) and in response to the United State's Response to the Idaho Legislature's Motion to Intervene [Dkt. 23].

RESPONSIVE DISCUSSION

Relevant Facts: The Legislature's Unique Defense

On Monday evening, August 8, 2022 (all dates hereinafter are 2022), the Legislature filed its Motion to Intervene (Dkt. 15)—just four business days after the Plaintiff ("Government") filed its Complaint (Dkt. 1) (and before the filing of any other document going to the merits of this case). The Motion to Intervene was filed just one business day after this Court ordered an expedited briefing and hearing schedule (Dkt 13). It was that expedited schedule—which the Legislature has committed to comply with—that caused the Legislature to act immediately with its Motion to Intervene.

At the time of that Motion's filing, the Legislature knew—based on its long history of legislating about abortion—that the Complaint's claim and especially its demand for injunctive relief was based on a false "factual" foundation. The falsehood is that "Relevant Abortions" were occurring in Idaho's Medicare-funded emergency rooms. Relevant Abortions are those emergency-room abortions that fall (i) *inside* the prohibition of abortion found in Idaho Code § 18-622 ("the 622 Statute") and (ii) *outside* the overlap between the 622 Statute's medical-emergency exception and EMTALA's medical-emergency mandate but still *inside* EMTALA's mandate.

Here is what that definition (first part) means in application. Ectopic "pregnancies" fall *outside* the 622 Statute's prohibition. That is the Legislature's clear understanding and intent, one shared by the executive branch. The Government probably believed as much when filing its Complaint (Dkt. 1). It says in relevant part: "Termination of an ectopic

pregnancy—which can never lead to a live birth and poses inherent danger to pregnant patients—is not considered an abortion by medical experts." *See* Complaint, p.7, n.1 (Dkt. 1). But, for reasons that will become clear in a moment, the Government chose to play the "reader-in-bad-faith" card with the 622 Statute: "However, the termination of an ectopic pregnancy appears to fall within Idaho's broad definition of abortion." *Id.* The Government then proceeded in its Complaint and its Motion for Preliminary Injunction and related papers on the basis that ectopic "pregnancies" fall *inside* the 622 Statute's prohibition. They do not. And, after all, it is Idaho's right, not the Government's, to define the scope of this State's laws.

Continuing with the second part of the definition: In their operation, there is an overlap as a matter of fact between the 622 Statute's medical-emergency exception and EMTALA's medical-emergency mandate. That overlap encompasses those medical emergencies where no informed and honest person, whether doctor or lawyer, can or will say that the abortion is not necessary to save the woman's life.

But theoretically, there are also medical cases that fall *outside* that overlap but still *inside* EMTALA's mandate. Those are the Relevant Abortions, and those are the only abortions, well, relevant to the Government's claim. That is because *only* when a Relevant Abortion case arises in the real world is there a real conflict between Congress's Spending Clause power and Idaho's regulatory power. No Relevant Abortions, no conflict. No conflict, no Article III case or controversy, only an invitation for an unconstitutional advisory opinion. And certainly, if no Relevant Abortions, no factual or legal basis for asking this Court to exercise its extraordinary equitable powers and tell a sovereign State

that it cannot enforce its own laws in full. After all, if there are no Relevant Abortions, the Government would be left saying: "We can't show that Relevant Abortions have been happening in Idaho, and therefore we have no basis for showing that they will in the future, but theoretically it could happen, so, your honor, enter an injunction telling Idaho it cannot exercise in full its police power, its regulatory power reserved to it and its people by the Tenth Amendment and very recently fully sustained by *Dobbs*." No good law exists that would sustain that kind of plea.

So in this case, the presence or absence of Relevant Abortions in Idaho is a *material* issue of fact (among a few more we discuss below). That leads to consideration of the Government's Motion for Preliminary Injunction (Dkt. 17) and "supporting" exhibits (Dkt. 17-1 through 17-13) (collectively "P.I. Motion"), filed just a couple of hours after the Legislature's Motion to Intervene.

Our careful review of the P.I. Motion leads to this firm conclusion: the Government has presented no admissible, credible evidence of Relevant Abortions. The Government creates a big smoke screen, as if it were really presenting such evidence, but it has not done so. A big part of the smoke screen is the presentation of data covering ectopic "pregnancies," which the Government treats as Relevant Abortions. That data is not at all relevant, but the Government has found it useful in generating a big smoke screen. We say "not at all relevant" because the 622 Statute does not prohibit or otherwise cover the termination of ectopic "pregnancies." And that in turn is because, as the Government itself made clear in its Complaint (Dkt. 1, p. 7 n. 1), an ectopic "pregnancy" can never end in a live birth and always creates a real risk, absent treatment, of the mother's death.

Nor do any of the doctor declarants present any admissible, credible evidence of Real Abortions happening in Idaho. Their declarations are written as if they are presenting just such evidence, but those declarations do not withstand close scrutiny and do not present the requisite admissible, credible evidence. (That defect, the Legislature is confident, will be fully illuminated during cross-examination of those doctors and further illuminated during the testimony on direct of the doctors and other witnesses the Legislature will call.)

Because this issue of fact—the presence or absence of Relevant Abortions in Idaho—is material, and, if the Legislature is a party, will be robustly contested, it can properly be resolved only through an evidentiary hearing. This Court cannot make findings of fact on the basis of conflicting competent affidavits. It will have to hear live testimony. Until it does, it cannot be said that the Government has met its heavy burden of showing entitlement to the extraordinary equitable remedy of an injunction directed against a sovereign State's exercise of its legitimate regulatory power.

In light of this reality, the Legislature's legal team has done two things. One, at the conclusion of its close scrutiny of the P.I. Motion, it immediately began making plans, based on anticipated party status, for the requisite evidentiary hearing, plans detailed in the following paragraphs. Two, it reached out to the Attorney General's Office to learn to what extent, if at all, that Office intends and is prepared to present evidence countering the Government's position on the material issues of fact. What we learned is that that Office has no clear present intent or plan to do anything of the sort.

Hence the need for party status for the Legislature. After all, only a party can present to this Court affidavits, declarations, live witnesses, and other forms of evidence. Only a

party has subpoena power. Only a party can cross-examine. Only a party willing to do all these things can show this Court the holes in the "factual" foundation of the P.I. Motion. What follows is the Legislature's plan to do that necessary work. In presenting that plan, we cannot guarantee that, because of the short time allowed, all parts of the plan will come to fruition, although we believe they will. What we can and do guarantee is that we will continue our intense efforts hour by hour in the preparation of the factual defense that is definitely there to be made on behalf of the 622 Statute and against the P.I. Motion.

The Legislature's present litigation plan encompasses the following:

The Legislature will subpoena the Idaho doctors the Government used as declarants. Our cross-examination of them will disclose the holes in their declarations, specifically, the absence of admissible evidence of Relevant Abortions and, also, the absence of a sound basis for the purported "fears" induced by the alleged "chilling" effect of the 622 Statute. (We are presently in doubt as to our subpoena power over the Government's Pennsylvania doctor.)

The Legislature will call one or more doctors who will give testimony countering and therefore discrediting the testimony of the Government's Idaho doctors, primarily on the two specifics just identified.

The Legislature will subpoena Ada County Prosecuting Attorney Jan M. Bennetts to testify regarding prosecutorial discretion and its exercise in instances of emergency-room abortions. (This sentence will be news to her.) She may be neutral, friendly, or hostile to the Legislature's cause; we do not know yet, but we know she will be an honest witness. Being that, her testimony will go a long way to discredit the Government's false picture of

the 622 Statute being applied indiscriminately to all emergency-room abortions. And, thereby, her testimony will also discredit the Government's false picture of Idaho's emergency-room doctors having to live in fear when confronting "close" cases.

The Legislature will subpoena a past or present State of Idaho official with knowledge of the State's abortion-reporting practices and records as required by law.[1] The Legislature will also subpoena a person knowledgeable in the coding of medical procedures for hospital records purposes in general and Medicare compliance purposes in particular. The testimony of those two witnesses, we presently believe, will counter what the Government must show but has not, the presence of Relevant Abortions in Idaho.

This is the kind of defense of the 622 Statute that the people of Idaho both expect and deserve, and the Legislature's unique ability and willingness to provide that defense in this case underscores the wisdom in enacting the Intervention Statute, Idaho Code § 67-465.

Rule 24(a) Mandatory Intervention

In any event, what the Legislature has set out above puts the lie to the Government's argument that the Attorney General's Office will "adequately defend" the State's interests

[1] See Idaho Code § 18-506 (mandating the reporting of abortions and the basis of the determination of the existence of a medical emergency in certain cases); § 39-261 (charging the vital statistics unit of the DHW to compile, store, and publicly publish reported abortion information); § 18-609G(1)(b) (requiring reporting of abortions performed on minors including whether there was a medical emergency); 18-609(7) (requiring reporting of abortions performed without certification and delivery of educational materials and the medical emergency that necessitated it).

and that therefore the Legislature has not satisfied Rule 24(a). See United States' Response to the Idaho Legislature's Motion to Intervene (Dkt. 23) ("Opposition") at 5–7.

Equally false is the Government's assertion that the Legislature "has not identified a sufficient interest in defending" the 622 Statute. *See* Opposition (Dkt. 23) at 3–5. The Legislature's interest begins with seeing that the 622 Statute is defended to the fullest extent that, under the law and the facts, a zealous party can defend it. The Legislature's interest is augmented in seeing that a federal district court, this Court, does not enter an injunction against the full exercise of the Legislature's hard-won, legitimate regulatory power in this realm of great moral, medical, and political importance—when that injunction is entered on a false "factual" basis that prevails only because not zealously challenged. *Those truths lead to an understanding of the Legislature's unique interest, the interest that is really at stake here*—its unique power and authority and duty to answer the hard questions posed by abortion, including this one: What is the moral value of a preborn child? And this one: In what situations are the mother's interests more weighty than the moral value and interests of the preborn child? That power and authority and duty do not reside with the executive branch but rather with and only with the Legislature. That power and authority and duty are indeed what is really at stake here and constitute the Legislature's "sufficient interest" that fully justifies its Rule 24(a) intervention.

With respect to *Berger* and intervention as of right, the Government seeks to evade *Berger's* mandate, squarely based on principles of our federalism, by throwing out distinctions that do not make a difference; in large measure, the Government bases its Opposition on the fact that the North Carolina statute respected in *Berger* has some words

different from the Intervention Statute. In doing so, the Government ignores, and tries to get this Court to ignore, that the evident intent, purposes, and policies of both statutes are all the same. The quintessential objective of both statutes is to assure that no state statute is subjected to constitutional challenge without a full, zealous, thorough-going defense. The key insight underlying both statutes is that, although executive-branch officials and other state actors may at times want to present either a luke-warm or no defense for a statute (and not infrequently do just that), the creators of that statute, the ones who labored to bring it forth, will invariably be strongly motivated to give their creation the best possible defense. And it is fair to say that that insight has its greatest validity in the context of regulating abortion, exactly because of the hard, hard nature of the Legislature's duty in that context. *Berger* says to the lower federal courts to honor that objective and give full scope to that insight.

Rule 24(b) Permissive Intervention

In light of all the foregoing and for one more reason, the Government's Opposition to Rule 24(b) permissive intervention fails. Opposition at 7–8. It says that the Attorney General's Office's defense of the 622 Statute will be adequate considering all the circumstances of this case. That statement is no longer plausible. The Opposition says that the Legislature does not have a defense to offer different from what the Attorney General's Office will provide. Again, that statement is no longer plausible.

And then the Opposition says nothing about something important. The Legislature has set forth an on-point case fully supporting permissive intervention by the Legislature. That case is *Priorities USA v. Benson*, 448 F. Supp. 3d 755 (E.D. Mich. 2020), which

granted permissive intervention to Michigan's legislature to defend its statute that was under constitutional attack. The Opposition says nothing about that case. Yet that case addresses and refutes every argument the Opposition makes against permissive intervention and does so on remarkably similar facts.

Cries of "Delay" and "Undue Prejudice"

That leaves only the assertions of "delay" and "undue prejudice to the United States." We grant that the Legislature's intervention will interfere with the Government's plans to steamroll the P.I. Motion through to a quick and easily won Order of its fashioning. We grant that the Legislature's intervention will make more work for the Government's lawyers. But that is not "prejudice to the United States," let alone "undue prejudice." The interest of the United States is in seeing justice done, in seeing cases decided on real facts and not smoke screens, in seeing due and proper scope given not only to Congress's Spending Clause powers but also to Idaho's (and its people's) Tenth Amendment right, so recently reaffirmed by *Dobbs*, to regulate abortion, and, here, in seeing that an administration openly and admittedly hostile to Idaho's right and to *Dobbs* is required to meet, if it can, a zealous, robust defense of the exercise of that right.

The Legislature is mindful of the August 25 "trigger" date and how this Court may be wondering about the compatibility of the Legislature's zealous, robust defense with this Court's understandable desire to rule on the P.I. Motion, one way or the other, before that date. To that wondering, the Legislature makes three points.

First, because historically in Idaho there have not been Relevant Abortions, there is no genuine urgency to rule on the P.I. Motion. We believe that the absence of Relevant

Abortions means that motion is fatally defective and cannot be granted. But at the very least, that absence counsels against getting stampeded into a premature ruling, one not based on a true and valid factual basis.

Two, there has been only one delay in this whole matter. That is the Government's delay from June 24 to August 2, with June 24 being the day *Dobbs* was announced and the "trigger" date became known with considerable certainty, and with August 2 being the date the Government filed its Complaint here. That is a lot of delay, especially considering how everything the parties and most certainly the Legislature have done since August 2 has been measured in single days, even hours. And because of the abominable leak of the majority opinion in *Dobbs*, a prudent Government, knowing about the "trigger" date here in Idaho, would have begun preparing its Complaint and P.I. Motion even before June 24. The Government is the only party to blame if the absolutely required evidentiary hearing cannot be completed before August 25.

Having said that, and this is point three, the Legislature is working at breakneck speed to prepare the Legislature's defense for presentation to this Court in an evidentiary hearing beginning Monday morning, August 22, and fully intends to be ready. The Legislature cannot see why the Government cannot do the same. Such a hearing can be completed before the "trigger" date. And it appears that this Court agrees; we understand from communications with the Attorney General's Office that this Court has set aside all of August 22 for just such an endeavor.

CONCLUSION

The way things are shaping up, if the Legislature is not in this case as a party, the fairness, justness, and rightness of any resolution favorable to the Government will be a very difficult sell. It will be a difficult sell to the people of Idaho. It will be a difficult sell to the multitude of people across the Nation who have their eyes on this case. It will be a difficult sell to law students over the coming years, even those who are pro-*Roe* and anti-*Dobbs*. The fairness and justness and rightness of such a resolution will be a hard sell because of the account set forth in this Reply of the defense that should have been heard but was not because the Legislature was not afforded party status.

Fortunately, the law and the facts unequivocally call for a ruling granting the Legislature's Motion to Intervene.

Dated this 11th day of August, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Proposed Intervenors-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2022, 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 950 Pennsylvania Avenue NW Washington, D.C. 20530	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: brian.netter@usdoj.gov

Attorneys for Plaintiff

Daniel Schwei DOJ-Civ Federal Programs Branch 1100 L Street, N.W., Ste. 11532 Washington, D.C. 20530	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: daniel.s.schwei@usdoj.gov

Attorneys for Plaintiff

Julie Straus Harris DOJ-Civ Civil Division, Federal Programs Branch 1100 L Street, N.W. Washington, D.C. 20530	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: julie.strausharris@usdoj.gov

Attorneys for Plaintiff

Lisa Newman U.S. Department of Justice Civil Division, Federal Programs Branch 1100 L Street, N.W. Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: lisa.n.newman@usdoj.gov

Attorneys for Plaintiff

Anna Lynn Deffebach DOJ-Civ Civil Division, Federal Programs Branch 1100 L Street, N.W., Ste. 12104 Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: anna.l.deffebach@usdoj.gov

Attorneys for Plaintiff

Christopher A. Eiswerth DOJ-Civ Federal Programs Branch 1100 L Street, N.W., Ste. 12310 Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: christopher.a.eiswerth@usdoj.gov

Attorneys for Plaintiff

Emily Nestler DOJ-Civ 1100 L Street Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: emily.b.nestler@usdoj.gov

Attorneys for Plaintiff

Lawrence G. Wasden Attorney General	☐ ☐ ☐	U.S. Mail Hand Delivered Facsimile: (208) 334-2400
Steven L. Olsen Chief of Civil Litigation Megan A. Larrondo Dayton P. Reed Ingrid C. Batey Deputy Attorneys General 954 W. Jefferson Street, 2nd Floor P.O. Box 83720 Boise, ID 83720-0010	☒	ECF Email: steven.olsen@ag.idaho.gov megan.larrondo@ag.idaho.gov dayton.reed@ag.idaho.gov ingrid.batey@ag.idaho.gov

Attorneys for Defendant

/s/ Daniel W. Bower
Daniel W. Bower

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
BRIAN D. NETTER
Deputy Assistant Attorney General
JOSHUA REVESZ
Counsel, Office of the Assistant Attorney General
ALEXANDER K. HAAS
Director, Federal Programs Branch
DANIEL SCHWEI
Special Counsel
ANNA DEFFEBACH (DC Bar # 241346)
LISA NEWMAN
EMILY NESTLER
CHRISTOPHER A. EISWERTH
Trial Attorneys
JULIE STRAUS HARRIS
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 993-5182
anna.l.deffebach@usdoj.gov

Counsel for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329-BLW **UNITED STATES' RESPONSE TO THE IDAHO LEGISLATURE'S MOTION TO INTERVENE [Dkt. 15]**

Table of Contents

INTRODUCTION

The United States does not oppose the Idaho Legislature's participation in this case as an *amicus curiae*, nor does the United States oppose Defendant, the State of Idaho, ceding some of its oral argument time to the Legislature if the State of Idaho wishes to do so. But the United States opposes the Legislature's motion to intervene in this case as a party. *See* Dkt. 15, Motion to Intervene. The Legislature is not entitled to intervene as of right, and this Court should not exercise its discretion to allow the Legislature permissive intervention. *See* Fed. R. Civ. P. 24(a), (b). The Legislature does not possess a protectable interest apart from the State of Idaho itself, and, at any rate, the Legislature's purported interests are adequately represented by the State of Idaho's participation in this litigation through the Attorney General's Office. The Legislature has not identified any divergence between its interests and the interests of the State of Idaho in this case, and it has not provided any justification that its intervention would aid the Court's decision in this case. Furthermore, allowing the Legislature to intervene would prejudice the United States under the agreed-upon briefing schedule unless the Court takes steps to mitigate the prejudice. The Legislature's motion should be denied.

If the Court is nonetheless inclined to grant the motion, the Court should order the Legislature and the Attorney General's Office to collectively file responses totaling no more than 20 pages. If the Court allows both the Legislature and the Attorney General's Office to file 20-page responses, the United States respectfully requests that the Court direct the defendants to file their response briefs on August 15 to allow the United States adequate time to reply to two response briefs. The Court should also afford the United States 20 pages for its reply brief.

BACKGROUND

The United States filed this case on August 2, 2022, challenging the constitutionality of Idaho Code § 18-622. *See* Dkt. 1, Compl. The Complaint names a single defendant: the State of Idaho. *Id.* ¶ 11. The United States served the State of Idaho, Dkt. 6, and subsequently conferred with attorneys

from the Idaho Attorney General's Office to reach an agreement on a proposed briefing schedule, Dkt. 13 (Scheduling Order). The schedule agreed to by the parties, and which the Court subsequently adopted, provided for the United States to file its Motion for a Preliminary Injunction on August 8, the State of Idaho to file its Response in Opposition on August 16, and the United States to file its Reply on August 19 by noon Mountain Standard Time. *Id.* The Court further scheduled a hearing on the Motion for August 22. *Id.*

Shortly before the United States filed its Motion for a Preliminary Injunction, on the evening of August 8, the Legislature moved to intervene as an intervenor-defendant pursuant to Rule 24(a) or Rule 24(b). Dkt. 15.[1] The Legislature seeks to intervene on the ground that, under Idaho law and the Federal Rules of Civil Procedure, the Legislature is entitled to intervene as of right in any actions challenging the constitutionality of a state law. Dkt. 15-1 at 8 (referencing Idaho Code § 67-465). The Legislature further requested that, if denied the opportunity to intervene, it should be permitted to file an *amicus curiae* brief and participate in the August 22 hearing.

LEGAL STANDARD

The Federal Rules of Civil Procedure permit a party to intervene as of right under Rule 24(a) and permissively under Rule 24(b). *Cooper v. Newsom*, 13 F.4th 857, 864 (9th Cir. 2021) *reh'g en banc denied*, 26 F.4th 1104 (9th Cir. 2022), *pet. for cert. docketed*, No. 21-1512 (June 2, 2022). Rule 24(a) permits intervention as a matter of right "when an applicant: (i) timely moves to intervene; (ii) has a significantly protectable interest related to the subject of the action; (iii) may have that interest impaired by the disposition of the action; and (iv) will not be adequately represented by existing parties." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) (citing Fed. R. Civ. P. 24(a)(2)). "In evaluating whether these requirements are met, courts 'are guided

[1] Despite conferring with the State of Idaho prior to filing its motion, *see* Dkt. 15 at 3, the Legislature did not ask the United States for its position on the motion prior to filing.

primarily by practical and equitable considerations." *Callahan v. Brookdale Senior Living Cmty., Inc.*, --- F.4th ---, 2022 WL 3016027, at *5 (9th Cir. June 29, 2022) (citation omitted). "Failure to satisfy any one of the requirements is fatal to the application." *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). An applicant seeking intervention bears the burden of proving that these requirements are met. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011).

When ruling on a motion for permissive intervention under Rule 24(b), a district court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Dep't of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (quoting Fed. R. Civ. P. 24(b)). "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Cooper*, 13 F.4th at 868.

ARGUMENT

I. The Court Should Deny The Legislature's Motion to Intervene As Of Right

The Legislature has failed to carry its burden of demonstrating both that it "has a significantly protectable interest related to the subject of the action" and that its interest "will not be adequately represented by existing parties." *Oakland*, 960 F.3d at 620. Rule 24(a)(2) intervention should accordingly be denied.

A. The Legislature Has Not Identified A Sufficient Interest In Defending Idaho Code § 18-622.

For a party to intervene as of right, it "must establish" that it has an interest that "is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Citizens for Balanced Use*, 647 F.3d at 897. Here, the Legislature contends that the Supreme Court's decision in *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022), justifies intervention, because the Idaho Legislature has enacted a statute authorizing the Legislature to intervene, just as the North Carolina legislature did in *Berger*. *See* Dkt. 15-1 at 7-11. Contrary to the

Legislature's claims, however, *Berger* does not compel this Court to allow the Legislature to intervene in this case, nor does the Legislature have sufficient protectable interest to justify such intervention.

The Supreme Court's decision in *Berger* arose from a challenge brought by private litigants against a state voter identification law. *Cf. Berger*, 142 S. Ct. at 2198. The suit named as defendants various Executive Branch officials—*i.e.*, the Governor and members of the State Board of Elections. *Id.* The North Carolina Attorney General represented those executive officials, even though "[m]ore than once a North Carolina attorney general has opposed laws enacted by the General Assembly and declined to defend them fully in federal litigation." *Id.* at 2197. Accordingly, the North Carolina legislature had enacted a law "empower[ing] the leaders of its two legislative houses to participate in litigation on the State's behalf under certain circumstances and with counsel of their own choosing." *Id.* Based on that state law, the Supreme Court held that the North Carolina legislature was entitled to intervene as of right. *See id.* at 2201-03.

Berger does not control here. Unlike *Berger*, the United States has brought suit against the State of Idaho—not particular officers of the State under the *Ex Parte Young* doctrine. *Cf.* 142 S. Ct. at 2201. By virtue of it being part of the State of Idaho itself, the Idaho Legislature is *already* a party. *Cf. id.* at 2203 (rejecting the argument that "the legislative leaders are already effectively 'existing' parties to this suit" because the plaintiff "has not sued the State"). The Idaho Legislature's participation and control over this litigation vis-à-vis attorneys in the Idaho Attorney General's Office is a matter of State law, to be worked out internally amongst those State officials. But it is not a reason for this Court to grant intervention, "adding" the Idaho Legislature as an additional party, when the State of Idaho (including the Legislature) is *already* a party to this case. And because the State of Idaho itself is the defendant, the practical concerns motivating *Berger* are not present here—there is no risk that the United States has "select[ed] as their defendants those individual officials [it] consider[s] most sympathetic to [its] cause or most inclined to settle favorably and quickly." *Id.* at 2201. Nor is there

any indication that the Attorney General's Office will offer anything but a robust defense of Idaho's law and represent the State's interests fully.

Berger is also distinguishable because Idaho law does not authorize the Legislature to represent the State's interests as North Carolina law expressly did. The North Carolina statute recognized that, when the State of North Carolina is named as a defendant, "both the General Assembly and the Governor constitute the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a). Idaho law, in contrast, states that "it is the duty of the attorney general … [t]o perform all legal services for the state and to represent the state … in all courts." Idaho Code § 67-1401(1). While the Legislature points to Idaho Code § 67-465, *see* Dkt. 15 at 2, which states that "[w]hen a party to an action … challenges an Idaho statute as violating or being preempted by federal law … either or both houses of the legislature may intervene in the action as a matter of right," that procedural statute does not indicate that the Legislature has a substantive interest to intervene in federal court or is a necessary party for fully representing or speaking on behalf of *the State's* interests, apart from the Legislature's own interests. *Cf. Berger*, 142 S. Ct. at 2202 (discussing prior cases involving state laws authorizing legislative officials to speak *on behalf of the State*). Nor is it clear that the statute could do so consistent with the separation of powers in Idaho's Constitution. *See* Idaho Const. art. II § 1. The Legislature retains no cognizable right to enforce Idaho Code § 18-622, and absent a recognized right to defend the State's interest, it lacks an interest similar to that recognized in *Berger*. *Cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-53 (2019).

B. The Legislature's Interests Are Adequately Represented By The State of Idaho

Whether a current party adequately represents the interests of the proposed intervenor depends on three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to

the proceeding that other parties would neglect." *Callahan*, 2022 WL 3016027, at *5 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). The Legislature has failed to demonstrate that any of these factors show the Attorney General's office is not adequately representing its interest in defending Idaho Code § 18-622. Intervention as of right should therefore also be denied for this independent reason.

The Legislature's interest in defending Idaho Code § 18-622 is coextensive with the State's general interest in continuing to enforce its statutes. Unlike in *Berger*, where the Attorney General's strategy was clearly divergent from what the Legislature preferred and seemed to prioritize stability over enforcement of the challenged law, *see* 142 S. Ct. at 2205, there is no reason here to doubt that the Idaho Attorney General's office will make every good-faith argument available to defend the State's law. Nor does the Legislature offer one. Indeed, the only conflicts the Legislature identifies between itself and the Attorney General's office involve the Idaho Supreme Court's original jurisdiction over other cases—a discrete issue of State law that will not arise in this federal case—and the Legislature's "paramount interest" in lifting a stay of the "implementation of the Heartbeat Act"—a statute not addressed in this suit. Dkt. 15-1 at 12-13. By contrast, the Legislature does not identify a single point of disagreement with the Attorney General's positions in this case. Absent some identifiable divergence in interests, there is no basis to conclude the current counsel for the State do not adequately represent the Legislature's interests. *See Oakland*, 960 F.3d at 620.

The Legislature likewise offers no reason to believe that the Attorney General's Office would not adequately represent the Legislature's supposedly "unique interest in an important issue of fact—the extent to which, if at all, Idaho emergency-room abortions occurred in this State" prior to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Dkt. 15-1 at 13. There is no indication that the Attorney General's Office would not assert every factual

defense.[2] And there is similarly no reason to doubt that the Attorney General's Office will adequately represent the Legislature's interests in any negotiations over the proper scope of injunctive relief. *Cf.* Dkt. 15-1 at 13. Indeed, the Attorney General's Office has refused to stay enforcement of Idaho Code § 18-622 pending this litigation. The Legislature's speculative assertions, at this point, are insufficient to justify intervention as of right.

* * *

Because the Legislature has not identified a legally protectable interest that will be impaired absent intervention or shown that the Attorney General's office does not adequately represent its interests, intervention under Rule 24(a)(2) should be denied. The Legislature can adequately present whatever perspective it wishes to bring to this case through an *amicus curiae* filing, to which the United States does not object. Nor does the United States object to the Legislature participating in oral argument, should the Attorney General's office wish to cede it time.

II. The Court Should Deny The Legislature's Motion For Permissive Intervention

The Court should similarly reject the Legislature's efforts to intervene under Rule 24(b) because the State of Idaho and the Attorney General's office adequately represent the Legislature's interests at this stage in the proceedings. Additionally, the Court should deny permissive intervention at this juncture because—contrary to the Legislature's contentions (Dkt. 15-1 at 16)—the Legislature's intervention would unduly prejudice the United States.

As discussed above, the Legislature is already a defendant in this action brought against the

[2] The United States has submitted evidence that physicians in Idaho have provided stabilizing care to pregnant patients, as required by EMTALA, that would qualify as "abortions" under Idaho Code § 18-622 and thus subject them to criminal liability if repeated after August 25, 2022. *See, e.g.*, Dr. Corrigan Decl. ¶¶ 16-18, Dkt. 17-6; Dr. Cooper Decl. ¶¶ 6-11, Dkt. 17-7; Dr. Seyb Decl. ¶¶ 7-12, Dkt. 17-8. The United States has also submitted evidence that such stabilizing care will almost certainly be necessary in the future to preserve pregnant patients' health and lives after August 25. *See, e.g.*, Dr. Fleisher Decl. ¶¶ 37-38, Dkt. 17-3; Dr. Corrigan Decl. ¶ 8, Dkt. 17-6; Dr. Seyb Decl. ¶ 6, Dkt. 17-8. The exact number of times that State law would preclude physicians from providing federally required care is irrelevant to whether Idaho Code § 18-622 is in conflict with EMTALA.

State of Idaho. The Legislature therefore lacks a distinct "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); Dkt. 15-1 at 15. Whatever claims or defenses the Idaho Legislature believes it possesses, those claims and defenses are entirely duplicative of the claims and defenses of the State of Idaho. And as discussed above, there is no reason to doubt that the State of Idaho, through attorneys in the Idaho Attorney General's Office, is fully capable of raising whatever claims and defenses might be available to the State.

On the other hand, granting intervention would prejudice the United States. The United States and the State of Idaho negotiated a briefing schedule under the assumption that they were the only Plaintiff and Defendant in this case. The briefing schedule in this case is extraordinarily expedited in light of the impending effective date of the challenged law. If the Court were to grant the Legislature's motion, the United States would need to respond to two opposition briefs of up to 20 pages each (plus an unknown number of factual submissions), but would, under the briefing schedule, have only two and a half days (and ten pages) to do so. Dkt. 13.

Adding an additional party without a distinct, identifiable interest needlessly complicates this fast-moving case. The Court should exercise its discretion and deny permissive intervention, at least at this preliminary juncture.

III. If The Court Grants The Legislature's Motion To Intervene, It Should Mitigate The Prejudice to the United States

When granting a motion for intervention, the Court has wide discretion to impose conditions on the circumstances of the intervention, in addition to the Court's inherent discretion to control its docket. *See Dep't of Fair Emp. & Hous.*, 642 F.3d at 741; Fed. R. Civ. P. 24 advisory committee's notes to the 1966 amendments (even intervention as of right under Rule 24(a) "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings"). If the Court grants the Legislature's motion, the United States requests that the Court impose conditions on the timing and length of the filings in this case.

Specifically, if the Court grants the Legislature's intervention motion, both the State and the Legislature should be required to comply with the agreed-upon briefing schedule as originally understood—*i.e.*, collectively, they should be permitted to file only a combined 20-page opposition. Alternatively, if the Court is inclined to allow the State and the Legislature each to file a 20-page opposition (for a combined total of up to 40 pages), the United States respectfully believes the briefing schedule should be modified to reflect this new development. Specifically, the United States requests that if it must reply to two response briefs, it should be accorded additional time to do so and the State and the Legislature should be ordered to file their response briefs on Monday, August 15 (rather than Tuesday, August 16), thereby giving the United States an additional day to reply to the 40 pages of opposition from the State and the Legislature. Additionally, the United States requests that it be accorded an additional ten pages for its reply brief to respond to the arguments made in both responses. Finally, if the Court grants the Legislature's motion to intervene, the United States also believes it would be appropriate for the State of Idaho and the Legislature to share divided argument time at the August 22, 2022 hearing.

CONCLUSION

For the foregoing reasons, the Court should deny the Legislature's Motion to Intervene.

Dated: August 10, 2022

Respectfully submitted,

SAMUEL BAGENSTOS
General Counsel

PAUL R. RODRÍGUEZ
Deputy General Counsel

DAVID HOSKINS
Supervisory Litigation Attorney

JESSICA BOWMAN
MELISSA HART
Attorneys

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General

JOSHUA REVESZ
Counsel, Office of the Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

U.S. Department of Health & Human Servs.
200 Independence Ave., SW
Washington, DC 20201

DANIEL SCHWEI
Special Counsel

/s/ Anna Deffebach
ANNA DEFFEBACH (DC Bar # 241346)
LISA NEWMAN
EMILY NESTLER
CHRISTOPHER A. EISWERTH
Trial Attorneys

JULIE STRAUS HARRIS
Senior Trial Counsel

U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 993-5182
anna.l.deffebach@usdoj.gov

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2022, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system and served the same via email, which caused the following parties or counsel to be served by electronic means.

Dayton Patrick Reed
Office of the Attorney General
PO Box 83720
Boise, ID 83720-0010
208-334-2400
Email: dayton.reed@ag.idaho.gov

Ingrid C Batey
Office of the Attorney General - Civil Litigation
954 W. Jefferson
Boise, ID 83720
208-697-9729
Email: ingrid.batey@ag.idaho.gov

Megan Ann Larrondo
Office of the Attorney General
954 W. Jefferson- Second Floor
Boise, ID 83720
208-332-3548
Email: megan.larrondo@ag.idaho.gov

Steven Lamar Olsen
Office of the Attorney General
POB 83720
Boise, ID 83720-0010
(208) 334-2400
Fax: (208) 854-8073
Email: steven.olsen@ag.idaho.gov

Counsel for Defendant

Monte N Stewart
11000 Cherwell Court
Las Vegas, NV 89144
Email: monteneilstewart@gmail.com

Daniel W. Bower
MORRIS BOWER & HAWS PLLC

12550 W. Explorer Dr. Suite 100
Boise, ID 83713
208-345-3333
Fax: 208-345-4461
Email: dbower@morrisbowerhaws.com

Counsel for Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature

/s/ Anna Deffebach
ANNA DEFFEBACH

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISV #3586
Chief of Civil Litigation

MEGAN A. LARRONDO, ISB #10597
INGRID C. BATEY, ISB #10022
Deputy Attorneys General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
ingrid.batey@ag.idaho.gov

Attorneys for Defendant State of Idaho

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329 **DEFENDANT STATE OF IDAHO'S NON-OPPOSITION TO IDAHO LEGISLATURE'S MOTION TO INTERVENE (DKT. 15)**

Defendant State of Idaho, by and through its undersigned counsel, pursuant to Dist. Idaho Loc. Rule 7.1(a)(5), hereby notify the Court and opposing counsel of its non-opposition to Idaho Legislature's Motion to Intervene (Dkt. 15).

/ / /

DATED this 10th day of August, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Megan A. Larrondo*
MEGAN A. LARRONDO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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

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

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

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

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

BRIAN D. NETTER
DOJ
Civil Division
brian.netter@usdoj.gov

/s/ Megan A. Larrondo
MEGAN A. LARRONDO
Deputy Attorney General

Erica Evancic

From: ecf@id.uscourts.gov
Sent: Tuesday, August 9, 2022 10:21 AM
To: CourtMail@idd.uscourts.gov
Subject: Activity in Case 1:22-cv-00329-BLW The United States v. State of Idaho

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District of Idaho (LIVE) NextGen 1.6

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Case Number: 1:22-cv-00329-BLW
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Document Number: 18(No document attached)

Docket Text:
DOCKET ENTRY ORDER: The parties shall respond to the motion to intervene (Dkt. [15]) by Wednesday, August 10, 2022. Signed by Judge B Lynn Winmill. (hgp)

1:22-cv-00329-BLW Notice has been electronically mailed to:

Anna Lynn Deffebach anna.l.deffebach@usdoj.gov

Brian David Netter brian.netter@usdoj.gov

Christopher A. Eiswerth christopher.a.eiswerth@usdoj.gov

Daniel Schwei daniel.s.schwei@usdoj.gov

Daniel W. Bower dbower@morrisbowerhaws.com, eevancic@morrisbowerhaws.com, ghaws@morrisbowerhaws.com

Dayton Patrick Reed dayton.reed@ag.idaho.gov, elaine.maneck@ag.idaho.gov

Emily Nestler emily.b.nestler@usdoj.gov

Ingrid C Batey ingrid.batey@ag.idaho.gov, colleen.funk@ag.idaho.gov

Julie Straus Harris julie.strausharris@usdoj.gov

Lisa Newman lisa.n.newman@usdoj.gov

Megan Ann Larrondo megan.larrondo@ag.idaho.gov, colleen.funk@ag.idaho.gov, elaine.maneck@ag.idaho.gov

Monte N Stewart monteneilstewart@gmail.com, dbower@stm-law.com, dheller@stm-law.com, sarah.paralegal@yahoo.com

Steven Lamar Olsen steven.olsen@ag.idaho.gov, elaine.maneck@ag.idaho.gov

1:22-cv-00329-BLW Notice will be served by other means to:

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 Intervenors-Defendants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-00329-BLW **IDAHO LEGISLATURE'S [PROPOSED] ANSWER**

This is the Answer of Intervenor-Defendants Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively the "Legislature") to the United States'

Complaint. This Answer's numbered paragraphs correspond to the numbered paragraphs of that Complaint.

1. The Legislature cannot answer the first sentence because the referenced "federal law" is not identified, and therefore the Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegation. EMTALA speaks for itself as to its content, and partial quotations therefrom and attempted paraphrases thereof are not a fit subject for admission or denial, and on that basis, the Legislature denies such, and further denies the remaining allegations.
2. The Legislature cannot answer because the referenced "a state" is not identified, and therefore the Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegations.
3. Denies.
4. Idaho Code § 18-622 ("Statute") speaks for itself as to its content, and attempted paraphrases thereof are not a fit subject for admission or denial, and on that basis, the Legislature denies all such paraphrases and further denies the remaining allegations.
5. The Legislature denies that EMTALA properly preempts the Statute and otherwise denies.
6. Admits.
7. Admits.
8. Admits.

9. The Legislature denies that any claim for relief has arisen and therefore denies the remaining allegations.

10. Admits.

11. The Legislature admits that Idaho is a state, cannot understand the Complaint's peculiar and ambiguous use of "includes," and therefore lacks knowledge or information sufficient to form a belief about the truth of the allegations.

12. The Supremacy Clause speaks for itself as to its content, which is therefore not a fit subject for admission or denial.

13. The cited cases speak for themselves as to their content, which is therefore not a fit subject for admission or denial. The Legislature otherwise denies.

14. Admits.

15. Admits.

16. To the extent that this allegation is a paraphrase of EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

17. To the extent that this allegation contains quotations from or paraphrases of EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

18. To the extent that this allegation contains quotations from or paraphrases of EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

19. To the extent that this allegation contains a partial quotation from EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

20. To the extent that this allegation contains a partial quotation from EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

21. To the extent that this allegation contains a partial quotation from EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

22. To the extent that this allegation contains a partial quotation from EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

23. Because EMTALA "requires" both more and less than is alleged, the Legislature denies.

24. Denies.

25. To the extent that this allegation contains a partial quotation from EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

26. The Legislature admits that the Statute was enacted in 2020 and will take effect on August 25, 2022, and otherwise denies.

27. To the extent that this allegation contains a partial quotation from the Statute, it is not a fit subject for admission or denial. The Legislature otherwise denies.

28. To the extent that this allegation contains a partial quotation from the Statute, it is not a fit subject for admission or denial. The Legislature otherwise denies.

29. To the extent that this allegation contains a partial quotation from the Statute, it is not a fit subject for admission or denial. The Legislature otherwise denies.

30. Denies.

31. Denies.

32. Denies.

33. Denies.

34. To the extent that this allegation contains a partial quotation from the Statute, it is not a fit subject for admission or denial. The Legislature otherwise denies.

35. The Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegations.

36. Denies.

37. To the extent that this allegation contains a partial quotation from EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

38. Denies.

39. Admits.

40. The Governor's press release speaks for itself as to its contents and is there not a fit subject of admission or denial. The Legislature otherwise denies.

41. The Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegations.

42. Denies.

43. Denies.

44. Denies.

45. Denies.

46. Denies.

47. Denies.

48. Congressional intent, like the language of a statute itself, is not a fit subject of admission or denial. The Legislature otherwise denies.

49. As to the United States' "interest," payments, conditions, "bargain," the Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegations and otherwise denies.

50. Denies.

51. Denies.

52. As to the number of hospitals, the Legislature lacks knowledge or information sufficient to form a belief about the truth of the allegations and otherwise denies.

53. Denies.

54. Denies.

55. The Legislature incorporates here all prior paragraphs.

56. The Supremacy Clause speaks for itself as to its content, which is therefore not a fit subject for admission or denial.

57. To the extent that this allegation contains a partial quotation from EMTALA, it is not a fit subject for admission or denial. The Legislature otherwise denies.

58. Denies.

59. Denies.

Additional Defenses

A. The Complaint fails to state a claim upon which relief can be granted.

B. Because of the level of emergency-room abortions in Idaho, there is no basis for injunctive relief.

C. Because of the level of emergency-room abortions in Idaho, the Complaint's prayer for a declaratory judgment is nothing other than a request for an advisory opinion; this civil action does not qualify as an Article III case or controversy and, thus, this Court has no jurisdiction over it, except to dismiss it.

D. The Legislature reserves the right to add additional defenses as time and information warrant. This Answer was drafted under extreme time pressures.

Prayer

The Legislature prays that this Court enter a final judgment (i) dismissing this civil action in its entirety with prejudice; (ii) awarding the Legislature its costs, expenses, and attorney's fees incurred in defending this civil action; and (iii) granting such other and further relief as may be just and proper in all the circumstances.

Dated this ____ day of August, 2022.

MORRIS BOWER & HAWS PLLC

By: _____
Daniel W. Bower

_____
Monte Neil Stewart

Attorneys for Intervenors-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of August, 2022, 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
950 Pennsylvania Avenue NW
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: brian.netter@usdoj.gov

Attorneys for Plaintiff

Daniel Schwei
DOJ-Civ
Federal Programs Branch
1100 L Street, N.W., Ste. 11532
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: daniel.s.schwei@usdoj.gov

Attorneys for Plaintiff

Julie Straus Harris
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: julie.strausharris@usdoj.gov

Attorneys for Plaintiff

Lisa Newman
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: lisa.n.newman@usdoj.gov

Attorneys for Plaintiff

Anna Lynn Deffebach
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W., Ste. 12104
Washington, D.C. 20005

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: anna.l.deffebach@usdoj.gov

Attorneys for Plaintiff

Christopher A. Eiswerth DOJ-Civ Federal Programs Branch 1100 L Street, N.W., Ste. 12310 Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: christopher.a.eiswerth@usdoj.gov

Attorneys for Plaintiff

Emily Nestler DOJ-Civ 1100 L Street Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: emily.b.nestler@usdoj.gov

Attorneys for Plaintiff

Lawrence G. Wasden Attorney General	☐ ☐ ☐	U.S. Mail Hand Delivered Facsimile: (208) 334-2400
Steven L. Olsen Chief of Civil Litigation Megan A. Larrondo Dayton P. Reed Ingrid C. Batey Deputy Attorneys General 954 W. Jefferson Street, 2nd Floor P.O. Box 83720 Boise, ID 83720-0010	☒	ECF Email: steven.olsen@ag.idaho.gov megan.larrondo@ag.idaho.gov dayton.reed@ag.idaho.gov ingrid.batey@ag.idaho.gov

Attorneys for Defendant

Daniel W. Bower

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 Proposed Intervenors-Defendants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-00329-BLW **MEMORANDUM IN SUPPORT OF IDAHO LEGISLATURE'S MOTION TO INTERVENE**

I Factual Background: The Idaho Legislature and Its Abortion Laws.

A. Legislative Action

In enacting the 622 Statute and Idaho's other abortion laws, the Legislature acted on its now-vindicated expectation that the day would soon come when the regulation of

abortion, with all its great moral and political questions, would be returned to the people and their elected legislators for resolution.

In its 2020 session, the Legislature enacted the 622 Statute. When it becomes effective, it will constitute Idaho's comprehensive regulation of abortion. That Statute allows for certain abortions that meet guidelines governing cases of medical emergency, rape, or incest and prohibits all other abortions. Enforcement is by executive-branch action through the criminal justice system and through the licensing system governing health care providers in this State. Although expressing the strongly held values and traditions of Idaho and its people relative to abortion, the 622 Statute was not to become effective until the United States Supreme Court returned regulation of abortion to the respective States' legislatures and their people, this delay being in deference to the federal constitution's Supremacy Clause and related principles of our federalism. *Dobbs v. Jackson Women's Health Org.*, —— U.S. ——, 142 S. Ct. 2228 (June 24, 2022), "triggered" the Statute's effective date, August 25, 2022.

In its 2021 session, the Legislature enacted Idaho's Fetal Heartbeat Preborn Child Protection Act, now codified at Idaho Code Title 18, Chapter 88 ("Heartbeat Act"). The Heartbeat Act allows more and prohibits fewer abortions than does the 622 Statute. For one thing, it does not subject to any enforcement mechanism abortions performed before detection of a fetal heartbeat. For another thing, the Heartbeat Act has a broader definition of "medical emergency" than does the 622 Statute. The Legislature made that definition broader by adding language reflecting language in the federal Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd ("EMTALA"). *Compare* Idaho Code 18-

8801(5) (defining "medical emergency" in part to mean a "condition … for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function") *with* EMTALA, § 1395dd § (1)(A) (defining "emergency medical condition" to mean in part a condition that "could reasonably be expected to result in-- . . . "(i) 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, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part").

In that 2021 session, the Legislature provided for enforcement of the Heartbeat Act by executive-branch action through the criminal justice system and through the licensing system governing health care providers in this State. The Heartbeat Act was not to become effective until a federal appellate court upheld against federal constitutional challenge another State's fetal heartbeat act similar to Idaho's, with this delay again being in deference to the federal constitution's Supremacy Clause and related principles of our federalism. By upholding on July 20, 2022, Georgia's fetal heartbeat act, the Eleventh Circuit with *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320 (11th Cir. 2022), "triggered" the Heartbeat Act's effective date, August 19, 2022.

In its 2022 session, the Legislature amended the Heartbeat Act by adding to it, through Senate Bills 1309 and 1358, provisions for additional enforcement by a private cause-of-action, that is, by private attorneys' general ("2022 Amendments"; now codified in material part at Idaho Code § 18-8807). The effective date for these private enforcement provisions was April 22, 2022, meaning that, from that date until the "triggering" of the

Heartbeat Act's other enforcement provisions, the private cause of action would be the Act's exclusive enforcement mechanism.[1]

B. Planned Parenthood Litigation

(All dates hereafter are in 2022.) With enforcement of the Heartbeat Act set to begin on April 22, by way of the private cause-of-action, Planned Parenthood and one of its doctors filed on March 30, a petition with the Idaho Supreme Court ("Court"), invoking its original jurisdiction, seeking a declaration that the 2022 Amendments were unconstitutional in their entirety under (and only under) the Idaho constitution, and asking for a stay of implementation of those Amendments. The only Respondent at that time was the State of Idaho, represented by the Idaho Attorney General's Office. In that early going, specifically, on April 8, the Court, as part of a broader order, stayed implementation of the 2022

[1] The 2022 Amendments prohibited anyone acting under color of state law from participating in any way in such a private civil action, this with the purpose of precluding any state or federal constitutional challenge to the Heartbeat Act in federal court, while preserving judicial review of the Act's state and federal constitutionality in state court. In this way, the 2022 Amendments well (indeed, in the only way possible) advance Idaho's important and legitimate interest in having the Idaho Supreme Court, either initially (through original jurisdiction) or ultimately (through appellate jurisdiction), rather than the court of a different sovereign, interpret the Heartbeat Act and determine its validity under the Idaho constitution.

Idaho indeed has a legitimate and powerful interest in seeing its laws interpreted by its own courts, especially its Supreme Court, in important part because of the unparalleled expertise of its Supreme Court in the interpretation and application of state law and in equally important part because the Idaho Supreme Court's interpretation becomes not just advisory but binding on all federal courts dealing with the law thereafter. The Legislature has sensibly determined that the Idaho Supreme Court, which is deeply embedded in and perceptive of not just the laws of this State but its society, culture, and people, is a superior forum for understanding, appreciating, and adjudicating Idaho's constitution and statutes. In so advancing those important and legitimate state interests, the Legislature did not do so out of enmity towards or a disparaging view of the federal judiciary; indeed, it has expressly acknowledged that under our federalism, federal judges perform vital and noble work. But as many of those judges themselves would readily acknowledge, when it comes to understanding and interpreting Idaho's constitution and statutes, the Idaho Supreme Court is the superior forum.

Amendments.[2] (Because Planned Parenthood has now filed three petitions with the Court, we hereafter refer to the proceeding initiated by the first petition as the "First Case.")

On April 14, the Legislature petitioned the Court for leave to intervene, this at a time before the Intervention Statute was effective.[3] The Court granted that leave, and the Legislature timely filed its brief on the merits and its subsequent brief on certain procedural issues. On August 3, the Court held a hearing on the procedural issues, and counsel for the Legislature and the Attorney General's Office divided equally the Respondents' allotted time.

The First Case is fully briefed on the merits, and the parties are waiting to see whether the Court will require oral argument before ruling.

With *Dobbs* being decided on June 24, Planned Parenthood filed its second petition on June 27, again invoking the Court's original jurisdiction, seeking a declaration that the entirety of the 622 Statute violates the Idaho constitution, and asking for an immediate stay of its implementation ("Second Case"). The original Respondents were various executive-branch officers, county prosecutors, and licensing boards, all represented by the Idaho Attorney General's Office. Citing the Intervention Statute, the Legislature moved to intervene on July 28, and on August 2, the Court granted that motion. Thus, the next day, the Legislature's counsel also argued important aspects of the 622 Statute before the Court.

[2] In relevant part, the order read: "The parties having both requested action by this Court to preserve the status quo to give the parties the ability to adequately brief this case, pursuant to l.A.R. 13(g) the implementation of Senate Bill 1309 is STAYED, pending further action by this Court."
[3] Its effective date was July 1.

With *SisterSong* being decided on July 20, Planned Parenthood filed its third petition on July 25, again invoking the Court's original jurisdiction, seeking a declaration that the rest of the Heartbeat Act, that is, the criminal and licensing enforcement provisions, violate the Idaho constitution, and asking for an immediate stay of their implementation ("Third Case"). The original Respondents were the same as in the Second Case, and again all are represented by the Idaho Attorney General's Office. Citing the Intervention Statute, the Legislature moved to intervene on July 28, and on August 2, the Court granted that motion.

The Clerk of the Idaho Supreme Court has provided online at https://coi.isc.idaho.gov/ all filings in the First Case (# 49615-2022), the Second Case (# 49817-2022), and the Third Case (# 49899-2022).

* * * * * * * * * *

We recite these facts about legislative activity and the Planned Parenthood litigation in important part to demonstrate that the Legislature is well suited, and in some respects uniquely well suited, to illuminate the entire legal and factual setting of the United States' challenge to the 622 Statute and thereby to aid this Court in its resolution of that challenge. It is fair to say that no other entity or individual has been as immersed in and centrally involved with that legal and factual setting as the Legislature. It is thus likewise fair to say that the Legislature both has important interests at stake in this civil action and the

motivation and resources to best defend those interests—all in a way making for the just and speedy resolution of this civil action.[4]

* * * * * * * * * *

The following section, Section II, explains how Federal Rule of Civil Procedure 24(a)(2), as interpreted and applied by *Berger v. N.C. State Conf. of the NAACP*, --U.S.--, 142 S. Ct. 2191 (2022), requires a holding that the Legislature may intervene in this civil action as a matter of right.

Section III demonstrates that the Legislature satisfies all guidelines under Federal Rule 24(b) for permissive intervention.

Section IV shows that, at the very least, this Court should allow the Legislature to brief the United States' preliminary injunction motion and participate in the August 22 hearing on it.

II Federal Rule of Civil Procedure 24(a)(2), as interpreted and applied by *Berger*, requires a holding that the Legislature may intervene in this civil action as a matter of right.

In relevant part, Federal Rule of Civil Procedure 24(a)(2) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
> ….
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

[4] See Federal Rule of Civil Procedure 1.

In a case with procedural facts and circumstances the same as this case, the United States Supreme Court recently held that under Federal Rule of Civil Procedure 24(a)(2), a state legislature could intervene as a matter of right. *Berger v. N.C. State Conf. of the NAACP*, --U.S.--, 142 S. Ct. 2191 (2022) (8-1 decision).

In *Berger*, a civil rights organization filed suit in federal district court, challenging the constitutionality of North Carolina's recently enacted "voter ID" law and naming as the defendants the Governor and the North Carolina Elections Board, both represented by the State's Attorney General.

A North Carolina statute similar to the Intervention Statute gives that State's legislature a right to intervene when any statute is challenged in federal or state court.[5] This statute specifies that the Speaker of the House of Representatives and the President Pro Tempore of the Senate, "as agents of the State, by and through counsel of their choice, including private counsel," are the ones "to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution."[6] Invoking that statute and F.R.C.P. 24, the North Carolina legislature sought to intervene by right and, in the alternative, by permission.

The federal district court denied intervention, and the Fourth Circuit affirmed. *Berger, supra,* at 2199-2200. Both courts applied a presumption that the Legislature's interests were adequately represented by the Attorney General. *Id.*

[5] North Carolina Gen. Stat. § 1-72.2.
[6] *Id.*

The United States Supreme Court reversed, holding that the North Carolina legislative leaders could intervene as a matter of right because they met all three of the factors listed in F.R.C.P. 24(a)(2)—that the court must "permit anyone to intervene who, (1) on timely motion, (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, (3) unless existing parties adequately represent that interest." *Id.* at 2200-01.

Timeliness was not an issue; the Supreme Court addressed the second and third factors. It focused "first on the question whether the legislative leaders have claimed an interest in the resolution of this lawsuit that may be practically impaired or impeded without their participation." *Id.* at 2201. The Supreme Court then set forth three indisputable realities: (1) The "States possess 'a legitimate interest in the continued enforce[ment] of [their] own statutes.'" (2) "States may organize themselves in a variety of ways." (3) "[W]hen a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge." *Id*. It then went on to hold that

> Appropriate respect for these realities suggests that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law. To hold otherwise would not only evince disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials. It would not only risk turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests. It would encourage plaintiffs to make strategic choices to control which state agents they will face across the aisle in federal court. It would tempt litigants to select as their defendants those individual officials they consider most sympathetic to their cause or most inclined to settle

> favorably and quickly. All of which would risk a hobbled litigation rather than a full and fair adversarial testing of the State's interests and arguments.

Id.

This holding was reinforced by "important national interests" and "many, clear, and recent" Supreme Court precedents. *Id.* at 2201–2202.

The Supreme Court then concluded that "[t]hese principles and precedents are dispositive here," rejected contrary arguments from the plaintiff and the Attorney General, and ruled in favor of the Legislature on Rule 24(a)(2)'s second factor. *Id*. at 2202–2203.

The Supreme Court then turned to the last issue, adequacy of representation. It noted that the lower federal courts had applied a variety of tests on this issue, generally, ones making it difficult for intervenors to meet the adequacy-of-representation requirement, such as the presumption relied on by the district and circuit courts in *Berger*. The Supreme Court disagreed with these tests, noting that "Rule 24(a)(2) *promises intervention* to those who bear an interest that may be practically impaired or impeded 'unless existing parties adequately represent that interest' … that "this Court has described the Rule's test as presenting proposed intervenors with only a *minimal challenge*." (*Id*. at 2203 (emphasis added). Accordingly, the Supreme Court ruled that "a presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." *Id.* at 2204. After all, "[f]or a federal court to presume a full overlap of interests *when state law more nearly presumes the opposite* would make little sense and do much violence to our system of cooperative federalism." *Id.*

After reviewing the particular facts in *Berger*, the Supreme Court concluded that the requisite *minimal* difference among the state actors in perspectives and therefore interests was present and, on that basis, ruled in favor by the Legislature. *Id*. at 2204–2206. In doing so, it rejected suggestions of possible problems with case management, finding them untenable. *Id*. at 2205–2206.

The Supreme Court's conclusion merits attention:

> Through the General Assembly, the people of North Carolina have authorized the leaders of their legislature to defend duly enacted state statutes against constitutional challenge. Ordinarily, a federal court must respect that kind of sovereign choice, not assemble presumptions against it. Having satisfied the terms of Federal Rule of Civil Procedure 24(a)(2), North Carolina's legislative leaders are entitled to intervene in this litigation.

Id. at 2206. And because it underscores the *minimal* nature of *Berger's* adequacy-of-representation standard, this language of Justice Sotomayor's sole dissent also merits attention:

> [T]he Court holds that two leaders of the North Carolina General Assembly are entitled to intervene as a matter of right to represent the State's interest in defending the constitutionality of North Carolina law, even though that interest is already being ably pursued on the State's behalf by an existing state party to the litigation.

Id.

With respect to defense of Idaho's abortion laws, the adequacy-of-representation issue must likewise be resolved in favor of intervention. The perspectives of Idaho's executive branch, represented by the Idaho Attorney General's Office, diverge from those of the Legislature and its legal team enough to satisfy *Berger's* minimal standard. That

divergence is unavoidable given the many strategic decisions and judgment calls that complex litigation like this calls for.

In the Planned Parenthood litigation, for example, the Legislature refused to endorse the Attorney General's Office's decision to argue against the Idaho Supreme Court's original jurisdiction and make that argument paramount. Indeed, the Legislature told the Court that, "[b]ecause we believe that the Court will be the court providing the final word on the issues presented here, and because we desire an expeditious final resolution of those issues, we will not be displeased if this Court holds that it does have jurisdiction."[7] (That "not displeased" term illuminates the tight-rope that the Legislature as a practical and political matter must walk without, on one side, unduly underscoring its interests and perspectives differing from those of its titular ally, the Attorney General's Office, and, on the other side, inadequately advocating for those interests and perspectives. The Legislature has and will continue to walk that walk, always adequately advocating for its own differing interests and perspectives.)

Then, at the August 3rd hearing before the Court, the Attorney General's Office focused on both its objection to original jurisdiction and some particular defenses of the 622 Statue, while the Legislature's counsel twice told the Court: "The Legislature's

[7] Brief of the Idaho Legislature at 5–6 n.6 filed April 28, 2022 in the First Case; available at https://coi.isc.idaho.gov/.

paramount interest is in the termination now of the stay of implementation of the Heartbeat Act."[8] One justice of the Court expressly questioned that divergence.[9]

In this case, the Legislature has a unique interest in an important issue of fact—the extent to which, if at all, Idaho emergency-room abortions occurred in this State under the now de-legitimized *Roe/Casey* abortion regime. In the Legislature's unique judgment, that issue of fact has a material role relative to the question of injunctive relief.

Further, based on past experience, it seems highly likely that the Legislature will have unique perspectives and interests relative to negotiation of stipulated injunctive language. That matters exactly because most cases of this type in the end are resolved in that fashion. That fact still obtains here even though the Legislature presently believes that the United States has no adequate grounds for injunctive relief, either preliminarily or permanently.

Finally, the Legislature's unique experience with Idaho's abortion laws, set forth in Section I above, assures that it will have unique interests and perspectives on key procedural and substantive issues bound to arise in a case of this type. (This case is still in its earliest, albeit crucial, phase.) It could not be otherwise. The Planned Parenthood litigation has demonstrated that pattern of difference and divergence on the Respondents' side again and again and will undoubtedly continue to do so.

To hold that the Legislature has not met here the minimal *Berger* standard is to ignore and rule contrary to that decision. To paraphrase only slightly, through their

[8] Notes and recollection of the Legislature's counsel.
[9] *Id.*

Legislature, the people of Idaho have authorized the leaders of their Legislature and their Legislature itself to defend duly enacted state statutes against constitutional challenge. A federal court *must* respect that kind of sovereign choice, not assemble arguments or reasons against it. Having satisfied the terms of Federal Rule of Civil Procedure 24(a)(2), the Idaho Legislature and its leaders are entitled to intervene in this litigation.

III The Legislature has satisfied F.R.C.P. 24(b)'s provisions and standards for permissive intervention.

F.R.C.P. Rule 24(b) provides:

> **(b) Permissive Intervention.**
> **(1)** ***In General.*** On timely motion, the court may permit anyone to intervene who:
> **(A)** is given a conditional right to intervene by a federal statute; or
> **(B)** has a claim or defense that shares with the main action a common question of law or fact.
> **(2)** ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
> **(A)** a statute or executive order administered by the officer or agency; or
> **(B)** any regulation, order, requirement, or agreement issued or made under the statute or executive order.
> **(3)** ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

As to the first requirement, a timely motion, "[t]imeliness is determined with reference to three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. . . . Under our longstanding precedent, [a] party seeking to intervene must act as

soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation."[10]

The Legislature has satisfied the timeliness requirement here. The United States filed its Complaint on Tuesday, August 2. On Friday, August 5, the Attorney General advised the Legislature of the status conference held that same day in this case and of the filing deadlines coming out of that conference, with the first being Monday, August 8, for the filing of the United States' motion for a preliminary injunction. The next business day, Monday, August 8, the Legislature filed this Motion to Intervene. Consequently, timeliness is not an issue under any approach or standard.

The "common question of law or fact" requirement is likewise not an issue here. As shown by the Legislature's proposed Answer attached as Exhibit A, the Legislature will be engaging the entirety of the United States' Complaint with a number of defenses, some of which will undoubtedly be in common with the Attorney General's Office's Answer once filed.

That leaves the question "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." F.R.C.P. 24(b)(3). Delay is not an issue here; the Legislature is willing and able to, and will, meet all deadlines set by this Court and/or by the parties by stipulation. As shown in the Planned Parenthood litigation, a preeminent interest of the Legislature is in the quick, even expedited, resolution of the

[10] Peruta v. Cty. of San Diego, 771 F.3d 570, 572 (9th Cir. 2014) (citations and internal quote marks omitted).

various challenges to its abortion laws. And the Legislature's legal team has the resources needed to avoid causing any delays.

As to prejudice, we can think of nothing that the Legislature's party status may do to prejudice either the United States or Idaho's executive branch. The fact that an intervening party may bring skilled, zealous advocacy and deep expertise in the subject matter to a case cannot qualify as prejudice, especially where all the original parties are public entities whose preeminent interest must be justice, not mere winning.

It is considerations such as these that recently led a federal district court in *Priorities USA v. Benson*, 448 F. Supp. 3d 755 (E.D. Mich. 2020), to grant permissive intervention to Michigan's legislature to defend its statute. In *Priorities USA*, the Legislature sought to intervene in a lawsuit challenging its absentee-ballot voting laws. *Id.* at 758. The Legislature moved to intervene in a timely manner—before the original defendant (Michigan's secretary of state) even responded and thus before the litigation could get into full swing. *Id*. at 763. The court noted that the Plaintiff "filed this lawsuit on October 30, 2019 and the Legislature moved to intervene on November 27, 2019, a mere twenty business days later (nineteen, accounting for the effect of Veterans' Day). It is difficult to imagine a more timely intervention." *Id.*

The court found that there was a common question of law or fact in the Legislature's interest in protecting its laws. *Id*. Importantly, the Court pointed out that as a "separate and coequal branch of government" to the executive, the Legislature also had an interest in defending the state's statutes, stating that "[a]lthough the Executive Branch, represented by Defendant, is tasked with enforcing the law and providing the primary defense against

lawsuits directed at the State, the Legislature has an interest in the preservation and constitutionality of the laws governing the State." *Id.* at 764. Furthermore, the outcome of the lawsuit could affect the Legislature and its makeup—a matter of interest to the Legislature. *Id*. The court found that these considerations constituted a common question of law or fact. *Id*. at 765.

Finally, because the Legislature was "not attempting to inject wholly unseen, unnecessary, or irrelevant issues" into the litigation, and it moved to intervene early in the litigation, the court found that the Legislature's intervention would not cause undue delay or prejudice to the original parties. *Id*.[11] "The court finds that Plaintiffs will not be unfairly prejudiced in having a motivated opponent that is willing to contest this case's important legal questions. Defendant, again, offers no dispute about the Legislature's entry into the case." *Id.* Based on these considerations, the court granted permissive intervention to the Legislature.

[11] The court expressed this helpful insight:

> [T]he Legislature attempts no more than to become a defendant and litigate the claims Plaintiffs have currently presented. It may be true that adding another party would add time and energy, for example requiring additional deposition questions or additional briefing on some motions. It may also be true that the Legislature could add different, and potentially successful, defenses to the signature matching laws during the course of litigation. However, expending such additional energy is not a waste, and appears to the court's satisfaction as important to effectuate the Legislature's purpose, providing a vigorous defense to Michigan's election laws. If there are costs or inefficiencies in the process, the court finds them worthwhile.

Id. at 765.

Again, a close paraphrase is appropriate: This Court should find that neither the United States nor the original defendants will be unfairly prejudiced in having a motivated opponent that is willing to contest this case's important legal questions.

In light of the foregoing, the Legislature respectfully urges this Court to grant it Rule 24(b) leave to intervene.

IV At the very least, this Court should allow the Legislature to file an *amicus curiae* brief regarding, and participate in the hearing on, the United States' motion for preliminary injunction.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, No. 1:15-CV-1191, 2017 WL 11454764, at *1 (W.D. Mich. Oct. 30, 2017), sets for well the governing standard:

> A federal district court has broad discretion to allow the participation of *amici curiae* in a case. . . . The Federal Rules of Civil Procedure do not address motions for leave to appear as amicus curiae in a federal district court, . . . and the decision to allow an appearance as *amicus curiae* falls under the district court's inherent authority . . . . When making such a decision to permit or deny *amicus* status, courts have considered a variety of factors, including the opposition of the parties, interest of the movants, partisanship, and adequacy of representation. . . . District courts focus on both the usefulness of the brief and the timeliness of the brief. (Citations omitted.)

The facts set forth in the prior Sections of this Memorandum satisfy these guidelines. The Legislature will meet the same filing deadline of August 19, facing the Attorney General's Office. There is no need to belabor these points.

V Conclusion.

In light of all the foregoing, the Legislature respectfully urges that this Court grant its Rule 24(a)(2) motion to intervene as of right, with the Legislature then becoming subject to all scheduling and deadlines already set in this case.

In the event this Court denies that motion, it should grant the Legislature's Rule 24(b) motion to intervene by permission, with the same proviso regarding deadlines.

In the event this Court refuses intervention, it should allow the Legislature to file an *amicus curiae* brief by August 19 and participate in the August 22 hearing. The Legislature says this, however, viewing such allowance as wholly inadequate to bring about the just resolution of this civil action. Intervention is the right and only adequate ruling.

Dated this 8th day of August, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Proposed Intervenors-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2022, 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
950 Pennsylvania Avenue NW
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: brian.netter@usdoj.gov

Attorneys for Plaintiff

Daniel Schwei
DOJ-Civ
Federal Programs Branch
1100 L Street, N.W., Ste. 11532
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: daniel.s.schwei@usdoj.gov

Attorneys for Plaintiff

Julie Straus Harris
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: julie.strausharris@usdoj.gov

Attorneys for Plaintiff

Lisa Newman
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: lisa.n.newman@usdoj.gov

Attorneys for Plaintiff

Anna Lynn Deffebach
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W., Ste. 12104
Washington, D.C. 20005

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: anna.l.deffebach@usdoj.gov

Attorneys for Plaintiff

Christopher A. Eiswerth DOJ-Civ Federal Programs Branch 1100 L Street, N.W., Ste. 12310 Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: christopher.a.eiswerth@usdoj.gov
Attorneys for Plaintiff		
Emily Nestler DOJ-Civ 1100 L Street Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: emily.b.nestler@usdoj.gov
Attorneys for Plaintiff		
Lawrence G. Wasden Attorney General	☐ ☐ ☐	U.S. Mail Hand Delivered Facsimile: (208) 334-2400
Steven L. Olsen Chief of Civil Litigation Megan A. Larrondo Dayton P. Reed Ingrid C. Batey Deputy Attorneys General 954 W. Jefferson Street, 2nd Floor P.O. Box 83720 Boise, ID 83720-0010	☒	ECF Email: steven.olsen@ag.idaho.gov megan.larrondo@ag.idaho.gov dayton.reed@ag.idaho.gov ingrid.batey@ag.idaho.gov
Attorneys for Defendant		

/s/ Daniel W. Bower
Daniel W. Bower

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 Proposed Intervenors-Defendants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-00329-BLW **IDAHO LEGISLATURE'S MOTION TO INTERVENE**

The Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively the "Legislature") respectfully move this Court for leave to intervene in this civil action as

intervenor-defendants to defend Idaho Code § 18-622. The Legislature makes its motion pursuant to Federal Rule of Civil Procedure 24(a)(2), as interpreted and applied by *Berger v. N.C. State Conf. of the NAACP*, --U.S.--, 142 S. Ct. 2191 (2022), which held that a state legislature may intervene as a matter of right in a case such as this. Alternatively, the Legislature makes its motion pursuant to Federal Rule of Civil Procedure 24(b), which invokes this Court's discretion as exercised under certain guidelines (both the Rule 24(a)(2) motion and the Rule 24(b) motion are hereafter referred to collectively as the "Motion"). As required by Federal Rule of Civil Procedure 24(c), the Legislature's proposed Answer is attached as Exhibit 1.

The Legislature makes its Motion on the grounds that;

- Idaho Code § 67-465 states: "When a party to an action challenges in state or federal court the constitutionality of an Idaho statute, facially or as applied, challenges an Idaho statute as violating or being preempted by federal law, or otherwise challenges the construction or validity of an Idaho statute, either or both houses of the legislature may intervene in the action as a matter of right by serving a motion upon the parties as provided in state or federal rules of civil procedure, whichever is applicable." (Hereafter, the "Intervention Statute.");
- the United States Supreme Court in *Berger* held that, in the face of a state statute like the Intervention Statute and in a case like this one, the state

legislature may intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2);

- because the Legislature is willing and able to, and will, meet all filing deadlines now and hereafter in effect, the intervention will not delay or prejudice the adjudication of the original parties' rights;
- the Legislature has unique understandings and insights into the statute at issue here, Idaho Code § 18-622 ("622 Statute"), that will assist this Court in the just resolution of this civil action;
- the Legislature has unique understandings and insights into Idaho emergency room abortions (the only type of abortions at issue here) that will also assist this Court in the just resolution of this civil action; and
- the defendant State of Idaho, represented by the Idaho Attorney General's Office, has no objection to the Motion.

In the event this Court denies the Motion, and with respect to the United States' Motion for Preliminary Injunction due to be filed on August 8, 2022, the Legislature moves for leave to file an *amici curiae* brief by August 19, 2022, and to participate in the August 22, 2022 hearing on that motion ("Amicus Motion"). The Amicus Motion invokes this Court's broad discretion to allow the participation of *amici curiae* in a case.[1] The Amicus Motion is based on the last four grounds set forth above for the Motion.

[1] *See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 159 n.27 (1967) (Stewart, J. dissenting); *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, No. 1:15-CV-1191,

The Motion and the Amicus Motion are further supported by the following Memorandum in Support of Motion.

Dated this 8th day of August, 2022.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Proposed Intervenors-Defendants

2017 WL 11454764, at *1 (W.D. Mich. Oct. 30, 2017); *Waste Mgmt. of Pennsylvania, Inc. v. New York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995).

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2022, 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
950 Pennsylvania Avenue NW
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: brian.netter@usdoj.gov

Attorneys for Plaintiff

Daniel Schwei
DOJ-Civ
Federal Programs Branch
1100 L Street, N.W., Ste. 11532
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: daniel.s.schwei@usdoj.gov

Attorneys for Plaintiff

Julie Straus Harris
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: julie.strausharris@usdoj.gov

Attorneys for Plaintiff

Lisa Newman
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: lisa.n.newman@usdoj.gov

Attorneys for Plaintiff

Anna Lynn Deffebach
DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W., Ste. 12104
Washington, D.C. 20005

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ ECF Email: anna.l.deffebach@usdoj.gov

Attorneys for Plaintiff

Christopher A. Eiswerth DOJ-Civ Federal Programs Branch 1100 L Street, N.W., Ste. 12310 Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: christopher.a.eiswerth@usdoj.gov

Attorneys for Plaintiff

Emily Nestler DOJ-Civ 1100 L Street Washington, D.C. 20005	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: ECF Email: emily.b.nestler@usdoj.gov

Attorneys for Plaintiff

Lawrence G. Wasden Attorney General	☐ ☐ ☐	U.S. Mail Hand Delivered Facsimile: (208) 334-2400
Steven L. Olsen Chief of Civil Litigation Megan A. Larrondo Dayton P. Reed Ingrid C. Batey Deputy Attorneys General 954 W. Jefferson Street, 2nd Floor P.O. Box 83720 Boise, ID 83720-0010	☒	ECF Email: steven.olsen@ag.idaho.gov megan.larrondo@ag.idaho.gov dayton.reed@ag.idaho.gov ingrid.batey@ag.idaho.gov

Attorneys for Defendant

/s/ Daniel W. Bower
Daniel W. Bower

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
BRIAN D. NETTER
Deputy Assistant Attorney General
JOSHUA REVESZ
Counsel, Office of the Assistant Attorney General
ALEXANDER K. HAAS
Director, Federal Programs Branch
DANIEL SCHWEI
Special Counsel
LISA NEWMAN (TX Bar No. 24107878)
ANNA DEFFEBACH
EMILY NESTLER
Trial Attorneys
JULIE STRAUS HARRIS
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 514-5578
lisa.n.newman@usdoj.gov

Counsel for Plaintiff
United States of America

[Additional counsel listed below]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329 **COMPLAINT**

The United States of America, by and through its undersigned counsel, brings this civil action for declaratory and injunctive relief, and alleges as follows:

PRELIMINARY STATEMENT

1. Under federal law, hospitals that receive federal Medicare funds are required to provide necessary stabilizing treatment to patients who arrive at their emergency departments while experiencing a medical emergency. Under the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, if a person with an "emergency medical condition" seeks treatment at an emergency department at a hospital that accepts Medicare funds, the hospital must provide medical treatment necessary to stabilize that condition before transferring or discharging the patient. Crucially, "emergency medical conditions" under the statute include not just conditions that present risks to life but also those that place a patient's "health" in "serious jeopardy" or risk "serious impairment to bodily functions" or "serious dysfunction of any bodily organ or part."

2. In some circumstances, medical care that a state may characterize as an "abortion" is necessary emergency stabilizing care that hospitals are required to provide under EMTALA. Such circumstances may include, but are not limited to, ectopic pregnancy, severe preeclampsia, or a pregnancy complication threatening septic infection or hemorrhage.

3. The State of Idaho, however, has passed a near-absolute ban on abortion. Once the Idaho law takes effect on August 25, 2022, Idaho Code § 18-622 will make it a felony to perform an abortion in all but extremely narrow circumstances. The Idaho law would make it a criminal offense for doctors to comply with EMTALA's requirement to provide stabilizing treatment, even where a doctor determines that abortion is the medical treatment necessary to prevent a patient from suffering severe health risks or even death.

4. Under the Idaho law, once effective, any state or local prosecutor can subject a physician to indictment, arrest, and prosecution merely by showing that an abortion has been performed, without regard to the circumstances. The law then puts the burden on the physician to prove an "affirmative defense" at trial. Idaho Code § 18-622(3) (2022). Nothing protects a physician

from arrest or criminal prosecution under Idaho's law, and a physician who provides an abortion in Idaho can avoid criminal liability only by establishing that "the abortion was necessary to prevent the death of the pregnant woman" or that, before performing the abortion, the pregnant patient (or, in some circumstances, their parent or guardian) reported an "act of rape or incest" against the patient to a specified agency and provided a copy of the report to the physician. *Id.* Beyond care necessary to prevent death, the law provides no defense whatsoever when the health of the pregnant patient is at stake. And, even in dire situations that might qualify for the Idaho law's limited "necessary to prevent the death of the pregnant woman" affirmative defense, some providers could withhold care based on a well-founded fear of criminal prosecution.

5. Idaho's abortion law will therefore prevent doctors from performing abortions even when a doctor determines that abortion is the medically necessary treatment to prevent severe risk to the patient's health and even in cases where denial of care will likely result in death for the pregnant patient. To the extent Idaho's law prohibits doctors from providing medically necessary treatment, including abortions, that EMTALA requires as emergency medical care, Idaho's new abortion law directly conflicts with EMTALA. *See* 42 U.S.C. § 1395dd(f) (EMTALA preempts State laws "to the extent that the requirement directly conflicts with a requirement of this section"). To the extent Idaho's law renders compliance with EMTALA impossible or stands as an obstacle to the accomplishment of federal statutes and objectives, EMTALA preempts the Idaho law under the Supremacy Clause of the United States Constitution.

6. In this action, the United States seeks a declaratory judgment that Idaho's law is invalid under the Supremacy Clause and is preempted by federal law to the extent that it conflicts with EMTALA. The United States also seeks an order preliminarily and permanently enjoining Idaho's restrictive abortion law to the extent it conflicts with EMTALA.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1345.

8. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because Defendant resides within this judicial district and because a substantial part of the acts or omissions giving rise to this action arose from events occurring within this judicial district.

9. Pursuant to D. Idaho Civ. R. 3.1, venue is proper in the Southern Division because Defendant legally resides in Ada County, Idaho, and because that is where the claim for relief arose.

PARTIES

10. Plaintiff is the United States of America.

11. Defendant, the State of Idaho, is a State of the United States. The State of Idaho includes all of its officers, employees, and agents.

SUPREMACY OF FEDERAL LAW

I. The Supremacy Clause and Preemption

12. The Supremacy Clause of the U.S. Constitution mandates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

13. "[S]tates have no power . . . to retard, impede, burden, or in any manner control the operations of the Constitutional laws enacted by [C]ongress to carry into effect the powers vested in the national government." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 317 (1819). "There is no doubt Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision," and a State law is invalid if it conflicts with such a provision. *Arizona v. United States*, 567 U.S. 387, 399 (2012). Likewise, a State law is invalid if compliance with the state

and federal law is impossible or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

II. The Emergency Medical Treatment and Labor Act (EMTALA)

14. Medicare, enacted in 1965 as Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*, is a federally funded program, administered by the Secretary of the Department of Health and Human Services (HHS), that pays health care providers or insurers for health care services under certain circumstances.

15. Medical providers' participation in Medicare is voluntary. When providers agree to participate in Medicare, they submit provider agreements to the Secretary of HHS. *See* 42 U.S.C. § 1395cc. Hospitals submitting such agreements agree that they will "adopt and enforce a policy to ensure compliance with the requirements of [EMTALA] and to meet the requirements of [EMTALA]." *Id.* § 1395cc(a)(1)(I)(i).

16. Under EMTALA, hospitals participating in Medicare are generally required to provide stabilizing health care to all patients who arrive at an emergency department suffering from an emergency medical condition. *See* 42 U.S.C. § 1395dd.

17. Specifically, EMTALA requires these hospitals to "screen" patients who request treatment at the hospital's emergency department and provide "necessary stabilizing treatment," including an appropriate transfer to another facility that is able to provide stabilizing care not available at the originating hospital, for any "emergency medical condition" the hospital identifies. 42 U.S.C. § 1395dd.

18. The screening requirement necessitates that hospitals act "to determine whether or not an emergency medical condition" exists. *Id.* § 1395dd(a); *see also* 42 C.F.R. § 489.24(a) (noting that EMTALA requires "an appropriate medical screening examination within the capability of the hospital's emergency department").

19. Congress defined an "emergency medical condition" in EMTALA as:

> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in-
>
> > (i) 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,
> >
> > (ii) serious impairment to bodily functions, or
> >
> > (iii) serious dysfunction of any bodily organ or part …
>
> (B) with respect to a pregnant woman who is having contractions-
>
> > (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
> >
> > (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

42 U.S.C. § 1395dd(e)(1).

20. If the hospital determines an individual has an emergency medical condition, "the hospital must provide either" (1) "further medical examination and such treatment as may be required to stabilize the medical condition," or (2) "transfer of the individual to another medical facility in accordance with" certain requirements. *Id.* § 1395dd(b)(1); *see also* 42 C.F.R. § 489.24(a)(1)(i)-(ii). The hospital may also "admit[] th[e] individual as an inpatient in good faith in order to stabilize the emergency medical condition." 42 C.F.R. § 489.24(d)(2)(i).

21. EMTALA defines "to stabilize" to mean "to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." 42 U.S.C. § 1395dd(e)(3)(A). The term "transfer" is defined to include "discharge" of a patient. *Id.* § 1395dd(e)(4).

22. A hospital may not transfer (including by discharging) an individual with an emergency medical condition who has not been stabilized, unless, *inter alia*, the individual requests a transfer or a

physician certifies that the benefits of a transfer to another medical facility outweigh the increased risks to the patient. *Id.* § 1395dd(c).

23. In short, when an emergency medical condition exists, EMTALA requires participating hospitals to provide "stabilizing" treatment, as determined by the particular hospital's facilities and the treating physician's professional medical judgment.

24. As relevant here, there are some pregnancy-related emergency medical conditions—including, but not limited to, ectopic pregnancy, severe preeclampsia, or a pregnancy complication threatening septic infections or hemorrhage—for which a physician could determine that the necessary stabilizing treatment is care that could be deemed an "abortion" under Idaho law.[1] In that scenario, EMTALA requires the hospital to provide that stabilizing treatment. *See* Dep't of Health and Human Servs., *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss*, CENTERS FOR MEDICARE & MEDICAID SERVICES (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf; *see also Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss*, CENTERS FOR MEDICARE & MEDICAID SERVICES (Sept. 17, 2021), https://www.cms.gov/files/document/qso-21-22-hospital.pdf.

25. EMTALA contains an express preemption provision, which preempts State laws "to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f).

[1] Termination of an ectopic pregnancy—which can never lead to a live birth and poses inherent danger to pregnant patients—is not considered an abortion by medical experts. However, the termination of an ectopic pregnancy appears to fall within Idaho's broad definition of abortion. *See* Idaho Code § 18-604(1).

IDAHO'S ABORTION LAW

26. In 2020, Idaho enacted a law that severely restricts abortions and threatens criminal prosecution against anyone who performs an abortion. The law, codified at Idaho Code § 18-622, is currently set to take effect on August 25, 2022, which is 30 days after issuance of the judgment in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *See* Idaho Code § 18-622(1)(a).

27. Under Idaho's abortion law, "[e]very person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion." *Id.* § 18-622(2). The crime of "criminal abortion" is a felony, punishable by two to five years imprisonment. *Id.*

28. Idaho's law also requires that "[t]he professional license of *any* health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense." *Id.* (emphasis added).

29. The Idaho law defines "[a]bortion" to mean "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." *Id.* § 18-604(1).

30. The *prima facie* criminal prohibition in Idaho's law does not contain any exceptions for when the pregnant patient's health or life is endangered. Thus, the mere performance of an abortion—even in an emergency, life-saving scenario—would subject a provider to criminal prosecution and require the provider to raise one of the law's narrow affirmative defenses at trial.

31. Idaho's abortion law provides for only two affirmative defenses, either of which the provider must prove by a preponderance of the evidence. In other words, once a prosecutor or licensing authority proves the *prima facie* case of an abortion having been performed, an accused physician may try to avoid conviction, incarceration, and loss of license by raising one of two

affirmative defenses, but bears the burden of proving the defense to a jury, along with the expense and uncertainty that flow from that burden.

32. Specifically, the accused physician would have to prove to a jury: (1) that "[t]he 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," or (2) in cases of rape or incest, that the woman, or, if a minor, the woman or her parent or guardian, "has reported the act of rape or incest to a law enforcement agency" and the physician, prior to performing the abortion, received a copy of a police report (or, in the case of a minor, a police report or report to child protective services) regarding "the act of rape or incest." Idaho Code § 18-622(3)(a)(ii), (b)(ii)-(iii).

33. There is no affirmative defense applicable in circumstances where an abortion is necessary to ensure the health of the pregnant patient—even where the patient faces serious medical jeopardy or impairment—if the care is not "necessary to prevent the death" of the patient.

34. In addition, it is a requirement for both affirmative defenses, and thus the physician would have to prove, that the physician "performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman." *Id.* § 18-622(3)(a)(iii), (b)(iv).

IDAHO'S ABORTION LAW CONFLICTS WITH EMTALA

35. Within the State of Idaho, there are approximately 43 hospitals that voluntarily participate in Medicare. Approximately 39 of those hospitals have emergency departments that are required to comply with EMTALA.

36. Idaho's criminal prohibition of all abortions, subject only to the statute's two limited affirmative defenses, conflicts with EMTALA. Idaho's criminal prohibition extends even to abortions that a physician determines are necessary stabilizing treatment that must be provided under EMTALA.

37. In particular, EMTALA's definition of an emergency medical condition—for which the hospital would be required to facilitate stabilizing treatment—is broader than just those circumstances where treatment is "necessary to prevent . . . death" under Idaho law. For example, EMTALA requires stabilizing treatment where "the health" of the patient is "in serious jeopardy," or where continuing a pregnancy could result in a "serious impairment to bodily functions" or a "serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii). Idaho has criminalized performing abortions in those circumstances, even when a physician has determined that an abortion is the necessary stabilizing treatment for a patient's emergency medical condition. The Idaho law therefore conflicts with federal law and is, in this respect, preempted.

38. The Idaho law also conflicts with EMTALA because the only limited protection it affords for even life-saving abortions is in the form of an affirmative defense where the provider bears the burden of proof at trial. Idaho's law subjects every provider who performs an abortion to the threat of indictment, arrest, and criminal prosecution. The law likewise subjects every provider and employee who performs or assists in performing an abortion to potential loss of their medical license. By threatening providers with criminal prosecution and license revocation proceedings for *every* abortion, regardless of whether it was "necessary to prevent . . . death," the Idaho law will deter physicians from performing abortions they have determined are medically necessary and thus must be provided under federal law. This is true even in the limited situations in which the abortions could be deemed defensible at a physician's criminal trial. "Where a prosecution is a likely possibility, yet only an affirmative defense is available," there "is a potential for extraordinary harm and a serious chill" upon protected conduct. *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004). Here, the law's obvious

chilling effect on providers' willingness to perform abortions, even when abortions are determined to be necessary medical treatments, is itself an impediment to the accomplishment of EMTALA's goal of ensuring that patients receive emergency care. The Idaho law is therefore preempted.

IDAHO'S ABORTION LAW CAUSES INJURY TO FEDERAL INTERESTS

39. The Idaho abortion law will become effective on August 25, 2022.

40. Following the Supreme Court's decision in *Dobbs*, the Governor of Idaho issued a press release stating that "Idaho has been at the forefront of enacting new laws" to restrict abortion, and specifically referencing § 18-622 as a bill that the Governor "signed into law" and "will go into effect later this summer."[2]

41. Before filing this lawsuit, on July 29, 2022, the United States sent a letter to the State of Idaho, expressing the United States' view that § 18-622 was contrary to federal law. The United States did not receive a substantive response.

42. Once the law goes into effect on August 25, 2022, providers will immediately be subject to the threat of arrest, imprisonment, criminal liability, and loss of license for providing federally required care.

43. Severe harm will result from Idaho's law, which violates the Supremacy Clause. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 366-67 (1989) (assuming that irreparable injury may be established "by a showing that the challenged state statute is flagrantly and patently violative of . . . the express constitutional prescription of the Supremacy Clause" (citation omitted)).

I. Idaho's Abortion Law Threatens Severe Public Health Consequences

44. If Idaho's abortion law is allowed to take effect, physicians in Idaho will be threatened with prosecution under a state law that prohibits them from providing necessary stabilizing medical

[2] https://gov.idaho.gov/pressrelease/gov-little-comments-on-scotus-overrule-of-roe-v-wade/

treatment required by EMTALA. Physicians will be faced with an untenable choice—either to withhold critical stabilizing treatment required under EMTALA or to risk criminal prosecution and potential loss of their professional licenses. As a result of Idaho's physicians being placed in this position, patients will suffer—including by having their care delayed or losing access to necessary health care that is guaranteed under federal law. Particularly in emergency circumstances, or when dealing with considerations of risk to an individual's life or health, delayed health care can pose serious harms and is exactly what EMTALA's requirements are designed to prevent. In short, the Idaho law threatens severe public health consequences.

45. For example, pregnant patients sometimes arrive at a hospital's emergency department with an emergency medical condition for which physicians reasonably determine that the appropriate stabilizing treatment is an emergency abortion. Physicians facing a threat of criminal prosecution for performing an emergency abortion may be reluctant to perform the procedure—even when their medical judgment leads them to conclude that the procedure is necessary. The loss of that necessary treatment will result in irreversible damage to the health of a pregnant patient in some instances, and in other cases could lead to death.

46. The Idaho law will deprive pregnant patients of necessary treatment required by EMTALA notwithstanding the Idaho law's affirmative defense for abortions "necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3)(a)(ii). Because that defense is available only during criminal prosecution or licensing proceedings, the law still subjects providers to the threat of criminal prosecution and potential loss of license for performing a life-saving abortion. And even the law's affirmative defense does not allow for abortions in emergency situations where pregnancy can reasonably be expected to place the health of the pregnant patient in serious jeopardy, seriously impair the pregnant patient's bodily functions, or cause serious dysfunction of any bodily part or organ.

II. Idaho's Law Interferes with EMTALA Obligations under the Federal Medicare Program

47. As discussed above, Idaho's abortion law directly conflicts with the important federal policy reflected in EMTALA, 42 U.S.C. § 1395dd, through which Congress codified a guarantee of necessary stabilizing medical treatment for patients with emergency medical conditions, including pregnant patients, who seek care at emergency departments. *See id.* § 1395dd(a), (b), (e)(1), (g).

48. Congress intended EMTALA to govern nationwide in every hospital that accepts Medicare funds, as confirmed by its express preemption of conflicting State laws. *Id.* § 1395dd(f). Idaho's law frustrates Congress's objective of guaranteeing nationwide emergency medical care at Medicare hospitals, because Idaho law prohibits a particular form of medical treatment—even when that treatment is necessary to stabilize a patient experiencing an emergency medical condition. The United States has a strong sovereign interest in ensuring that States may not disrupt the federal objectives embodied in EMTALA, particularly when States seek to hold physicians criminally liable for providing stabilizing emergency treatment required under federal law.

49. The United States has an interest in protecting the integrity of the funding it provides under Medicare and ensuring that hospitals who are receiving Medicare funding will not refuse to provide stabilizing treatment to patients experiencing medical emergencies. From 2019 to 2020, HHS paid approximately 74 million dollars for emergency department care in Idaho hospitals enrolled in Medicare. A condition of hospitals' enrollment in Medicare is that they agree to comply with EMTALA. *See id.* § 1395cc(a)(1)(I)(i). Thus, part of the United States' bargain when it agrees to provide Medicare reimbursement to hospitals is that those hospitals will, in return, provide all forms of stabilizing treatment to emergency department patients, consistent with EMTALA.

50. Idaho's law prevents the United States from receiving the benefit of its bargain, however, by affirmatively prohibiting Idaho hospitals from complying with certain obligations under EMTALA. Thus, Idaho's law undermines the overall Medicare program and the funds that the United

States provides in connection with that program, by precluding the United States from receiving one of the benefits to which it is entitled under the Medicare program.

51. Idaho's law also improperly interferes with the United States' pre-existing agreements with hospitals under Medicare. Under these agreements, each hospital (including those in Idaho) must certify that it "agrees to conform to the provisions of section 1866 of the Social Security Act and applicable provisions in 42 CFR," CMS Form 1561, and those referenced provisions likewise include obligations to comply with EMTALA.[3]

52. Approximately 43 hospitals in Idaho have signed Medicare agreements, and approximately 39 of those hospitals have emergency departments that must comply with EMTALA. Compliance with Idaho's law would force these hospitals to violate their agreements with the United States because Idaho criminalizes the provision of stabilizing medical services required by EMTALA, and thus Idaho's law likewise interferes with the United States' interests.

53. Waiting to initiate federal enforcement actions directly against physicians or hospitals would likely have significant negative consequences on public health, including because such actions could be pursued only after physicians or hospitals had first denied emergency care to an individual in need. Unless the action is filed against a state-run hospital, the State would not be a party to a federal enforcement action, and the State's absence would further delay the resolution of this issue. Meanwhile, patients would be denied important life-saving and stabilizing medical care, resulting in needless suffering and even loss of life. Physicians and hospitals should not be placed in the untenable position of risking criminal prosecution under state law or subjecting themselves to enforcement actions under federal law. Pregnant patients who arrive at an emergency department are entitled to the stabilizing emergency care ensured under federal law when experiencing life- or health-threatening conditions.

[3] https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/cms1561.pdf

54. The law likewise stands as an obstacle to Congress's goal of ensuring that patients receive effective emergency care by threatening the professional license of *any* health care professional who "assists" in performing or attempting to perform an abortion. Idaho Code § 18-622(2). In particular, the law threatens a six-month suspension of the license of any health care professional who assists in an abortion or, on a second offense, threatens to permanently bar these providers from their professional practice. A pregnant patient who arrives in the emergency department with an emergency condition is likely to encounter not just emergency department physicians but also triage nurses, scrub nurses, lab techs, radiologists, anesthesiologists, and others whose role in any procedure could constitute "assisting" in the performance of an abortion. By threatening the license of other hospital employees whose care is critical to providing emergency department care, Idaho's law impedes EMTALA's goal of ensuring that patients receive effective emergency care.

CLAIM FOR RELIEF

Preemption Under the Supremacy Clause and EMTALA

55. Plaintiff hereby incorporates paragraphs 1 through 54 as if fully set forth herein.

56. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

57. EMTALA expressly preempts State laws "to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). Idaho Code § 18-622 violates the Supremacy Clause and is preempted to the extent it is contrary to EMTALA.

58. The law imposes requirements that are contrary to EMTALA and impedes the accomplishment and execution of the full purposes and objectives of federal law and is therefore preempted.

59. The Idaho law therefore violates the Supremacy Clause and is preempted under federal law to the extent that it conflicts with EMTALA.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests the following relief:

a. A declaratory judgment stating that Idaho Code § 18-622 violates the Supremacy Clause and is preempted and therefore invalid to the extent that it conflicts with EMTALA;

b. A declaratory judgment stating that Idaho may not initiate a prosecution against, seek to impose any form of liability on, or attempt to revoke the professional license of any medical provider based on that provider's performance of an abortion that is authorized under EMTALA;

c. A preliminary and permanent injunction against the State of Idaho—including all of its officers, employees, and agents—prohibiting enforcement of Idaho Code § 18-622(2)-(3) to the extent that it conflicts with EMTALA;

d. Any and all other relief necessary to fully effectuate the injunction against Idaho Code § 18-622's enforcement to the extent it conflicts with EMTALA;

e. The United States' costs in this action; and

f. Any other relief that the Court deems just and proper.

Dated: August 2, 2022

Respectfully submitted,

SAMUEL BAGENSTOS
General Counsel

PAUL R. RODRÍGUEZ
Deputy General Counsel

DAVID HOSKINS
Supervisory Litigation Attorney

JESSICA BOWMAN
MELISSA HART
Attorneys
Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

BRIAN D. NETTER
Deputy Assistant Attorney General

JOSHUA REVESZ
Counsel, Office of the Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

DANIEL SCHWEI
Special Counsel

/s/ Lisa Newman
LISA NEWMAN (TX Bar No. 24107878)
ANNA DEFFEBACH
EMILY NESTLER
Trial Attorneys

JULIE STRAUS HARRIS
Senior Trial Counsel

U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20005
Tel: (202) 514-5578
lisa.n.newman@usdoj.gov

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

Form 1. Notice of Appeal from a Judgment or Order of a United States District Court

U.S. District Court case number: 1:22-cv-00329-BLW

Notice is hereby given that the appellant(s) listed below hereby appeal(s) to the United States Court of Appeals for the Ninth Circuit.

Date case was first filed in U.S. District Court: 08/02/2022

Date of judgment or order you are appealing: 02/03/2023

Docket entry number of judgment or order you are appealing: 125

Fee paid for appeal? *(appeal fees are paid at the U.S. District Court)*

◉ Yes ○ No ○ IFP was granted by U.S. District Court

List all Appellants *(List **each** party filing the appeal. Do not use "et al." or other abbreviations.)*

The Speaker of the Idaho House of Representatives, Mike Moyle; Idaho State Senate President Pro Tempore, Chuck Winder; and the Sixty-Seventh Idaho Legislature

Is this a cross-appeal? ○ Yes ◉ No

If yes, what is the first appeal case number?

Was there a previous appeal in this case? ○ Yes ◉ No

If yes, what is the prior appeal case number?

Your mailing address (if pro se):

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature /s/ Daniel W. Bower **Date** Mar 2, 2023

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 6. Representation Statement

Instructions for this form: http://www.ca9.uscourts.gov/forms/form06instructions.pdf

Appellant(s) *(List **each** party filing the appeal, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

The Speaker of the Idaho House of Representatives, Mike Moyle; Idaho State Senate President Pro Tempore, Chuck Winder; and the Sixty-Seventh Idaho Legislature

Name(s) of counsel (if any):

Daniel W. Bower
Monte Neil Stewart

Address: 1305 12th Ave. Rd., Nampa, ID 83686

Telephone number(s): 208-345-3333

Email(s): dbower@morrisbowerhaws.com; monteneilstewart@gmail.com

Is counsel registered for Electronic Filing in the 9th Circuit? ◉ Yes ○ No

---

Appellee(s) *(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)*

Name(s) of party/parties:

United States of America

Name(s) of counsel (if any):

Anna L. Deffebach

Address: 1100 L Street, N.W., Washington, D.C. 20005

Telephone number(s): (202) 993-5182

Email(s): anna.l.deffebach@usdoj.gov

To list additional parties and/or counsel, use next page.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ◉ Yes ○ No

Appellees

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

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APPEAL,LC17

U.S. District Court
District of Idaho (LIVE) NextGen 1.7 (Boise − Southern)
CIVIL DOCKET FOR CASE #: 1:22−cv−00329−BLW

The United States v. State of Idaho
Assigned to: Judge B Lynn Winmill
Case in other court: Ninth Circuit, 23−35153
Ninth Circuit Court of Appeals, 23−35440
Ninth Circuit Court of Appeals, 23−35450
Cause: 28:2201 Constitutionality of State Statute(s)

Date Filed: 08/02/2022
Jury Demand: None
Nature of Suit: 950 Constitutional − State Statute
Jurisdiction: U.S. Government Plaintiff

Plaintiff

United States of America represented by

Brian David Netter
DOJ−Civ
Civil Division
950 Pennsylvania Avenue NW
Washington, DC 20530
202−514−2000
Email: brian.netter@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Daniel Schwei
DOJ−Civ
Federal Programs Branch
1100 L St NW
Ste 11532
Washington, DC 20530
202−305−8693
Email: daniel.s.schwei@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Julie Straus Harris
DOJ−Civ
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20530
202−353−7633
Email: julie.strausharris@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lisa Newman
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
202−514−5578
Email: lisa.n.newman@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Anna Lynn Deffebach
DOJ−Civ
Civil Division− Federal Programs Branch
1100 L ST NW
Ste Lst 12104
Washington, DC 20005
202−993−5182
Email: anna.l.deffebach@usdoj.gov

ATTORNEY TO BE NOTICED

Christopher A. Eiswerth
DOJ−Civ
Federal Programs Branch
1100 L Street, NW
Ste 12310
Washington, DC 20005
202−305−0568
Email: christopher.a.eiswerth@usdoj.gov
ATTORNEY TO BE NOTICED

Emily Nestler
DOJ−Civ
1100 L Street
Washington, DC 20005
202−305−0167
Email: emily.b.nestler@usdoj.gov
ATTORNEY TO BE NOTICED

V.

Defendant

State of Idaho represented by **Brian V Church**
Office of the Attorney General, Civil Litigation Division
954 W. Jefferson St., 2nd Floor
P.O. Box 83720
Boise, ID 83702−0010
208−334−2400
Fax: 208−854−8073
Email: brian.church@ag.idaho.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Clay R Smith
OFFICE OF ATTORNEY GENERAL
POB 83720
Boise, ID 83720−0010
(208) 334−4118
Fax: (208) 854−8073
Email: crsmith73@outlook.com
TERMINATED: 01/04/2023
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Dayton Patrick Reed
Office of the Attorney General
PO Box 83720
Boise, ID 83720−0010
208−334−2400
Email: dreed@adacounty.id.gov
TERMINATED: 12/13/2022
LEAD ATTORNEY

Ingrid C Batey
Office of the Attorney General − Civil Litigation
954 W. Jefferson
Boise, ID 83720
208−697−9729
Email: ingrid.batey@ag.idaho.gov
TERMINATED: 12/15/2022
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Joan Elizabeth Callahan
Naylor & Hales, P.C.
950 W. Bannock Street
Boise, ID 83702
208−383−9511x2084
Email: joan@naylorhales.com
TERMINATED: 07/06/2023
LEAD ATTORNEY

Lincoln Davis Wilson
Idaho Attorney General's Office
P.O. Box 83720
Boise, ID 83720−0010
208−334−2400
Email: lincoln.wilson@ag.idaho.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Megan Ann Larrondo
City of Boise
PO Box 500
Boise, ID 83701−0500
208−608−7950
Email: mlarrondo@cityofboise.org
TERMINATED: 11/01/2022
LEAD ATTORNEY

Steven Lamar Olsen
OFFICE OF THE ATTORNEY GENERAL
POB 83720
Boise, ID 83720−0010
(208) 334−2400
Fax: (208) 854−8073
Email: steven.olsen@ag.idaho.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Alan Wayne Foutz
Idaho Attorney General's Office
Civil Litigation Division
P.O. Box 83720
Boise, ID 83720−0010
208−334−2400
Fax: 208−854−8073
Email: alan.foutz@ag.idaho.gov
ATTORNEY TO BE NOTICED

V.

Intervenor Defendant

Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature

represented by **Monte N Stewart**
11000 Cherwell Court
Las Vegas, NV 89144
208−514−6360
Email: monteneilstewart@gmail.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Daniel W. Bower
MORRIS BOWER & HAWS PLLC
12550 W. Explorer Dr. Suite 100

Boise, ID 83713
208−345−3333
Fax: 208−345−4461
Email: dbower@morrisbowerhaws.com
ATTORNEY TO BE NOTICED

Amicus

New York, State of represented by **Laura Etlinger**
NYS Office of The Attorney General
Division of Appeals and Opinions
The Capitol
Albany, NY 12224
518−776−2028
Fax: 518−915−7725
Email: laura.etlinger@ag.ny.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

California, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Connecticut, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Colorado, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Delaware, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Hawaii, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Illinois, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Maine, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Maryland, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Massachusetts, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Michigan, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Minnesota, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Nevada, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

New Jersey, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

New Mexico, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

North Carolina, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Oregon, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Pennsylvania, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Amicus

Rhode Island, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Washington, State of represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

Washington DC represented by **Laura Etlinger**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

American Center for Law & Justice represented by **Jay Alan Sekulow**
American Center for Law & Justice
201 Maryland Ave. NE
Washington, DC 20002
202−546−8890
Email: sekulow@aclj.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Laura Hernandez
American Center for Law and Justice
1000 Regent University Dr.
Virginia Beach, VA 23464
757−955−8164
Email: lhernandez@aclj.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jordan A. Sekulow
American Center for Law and Justice
201 Maryland Ave., NE
Washington, DC 20002
202−546−8890
Email: jordansekulow@aclj.org
ATTORNEY TO BE NOTICED

Olivia F. Summers
American Center for Law & Justice
1000 Regent University Dr., RH 422
Virginia Beach, VA 23464
307−760−8956
Email: osummers@aclj.org
ATTORNEY TO BE NOTICED

Stuart Roth
American Center for Law and Justice
201 Maryland Avenue, NE
Washington, DC 20002
202−253−0627
Email: stuartroth1@gmail.com
ATTORNEY TO BE NOTICED

Amicus

American College of Emergency Physicians

represented by **Shannon Rose Selden**
Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, NY 10001
212−909−6000
Fax: 212−909−6836
Email: srselden@debevoise.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, NY 10001
212−909−6000
Email: aauklandpeck@debevoise.com
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
Democracy Forward
P.O. Box 34553
Washington, DC 20043
202−701−1773
Email: jdubner@democracyforward.org
ATTORNEY TO BE NOTICED

John T. Lewis
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
202−448−9090
Email: john.t.lewis.iii@usdoj.gov
ATTORNEY TO BE NOTICED

Leah S. Martin
Debevoise & Plimpton LLP
801 Pennsylvania Avenue N.W.
Ste 500
Washington, DC 20004
202−383−8000
Email: lmartin@debevoise.com
ATTORNEY TO BE NOTICED

Maher Mahmood
Democracy Forward
P.O. Box 34553
Washington, DC 20043
202−448−9090
Email: mmahmood@democracyforward.org
ATTORNEY TO BE NOTICED

Amicus

Idaho Chapter of the American College of Emergency Physicians

represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner

(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

American College of Obstetricians and Gynecologists represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

Society for Maternal−Fetal Medicine represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood

(See above for address)
ATTORNEY TO BE NOTICED

Amicus

National Medical Association represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

National Hispanic Medical Association represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

American Academy of Pediatrics represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)

ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

American Academy of Family Physicians represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

American Public Health Association represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)

ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

American Medical Association, represented by **Shannon Rose Selden**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Adam B. Aukland−Peck
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey B. Dubner
(See above for address)
ATTORNEY TO BE NOTICED

John T. Lewis
(See above for address)
ATTORNEY TO BE NOTICED

Leah S. Martin
(See above for address)
ATTORNEY TO BE NOTICED

Maher Mahmood
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

The American Hospital Association represented by **Amanda K Rice**
Jones Day
150 W Jefferson Ave Suite 2100
Suite 2100
Detroit, MI 48226
313−230−7926
Email: arice@jonesday.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte H Taylor
Jones Day
51 Louisiana Ave., NW
Washington, DC 20001
202−879−3872
Email: ctaylor@jonesday.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jacob M Roth
Jones Day
51 Louisiana Avenue NW
Washington, DC 20001
202−879−7658
Email: yroth@jonesday.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Olson
Stoel Rives, LLP
101 S. Capitol Blvd., Ste. 1900
Boise, ID 83702
208−389−9000
Fax: 208−389−9040
Email: wendy.olson@stoel.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

The Association of American Medical Colleges represented by

Amanda K Rice
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Charlotte H Taylor
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jacob M Roth
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Wendy Olson
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

State of Indiana
Office of the Indiana Attorney General
302 W. Washington Street
IGC South, Fifth Floor
Indianapolis, IN 46204
317−232−6255
represented by

Thomas Molnar Fisher
Office of IN Attorney General
Solicitor General
302 West Washington Street
IGC−South, Fifth Floor
Indianapolis, IN 46204
317−232−6255
Email: tom.fisher@atg.in.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amicus

State of Alabama represented by

Thomas Molnar Fisher
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Arkansas represented by

Thomas Molnar Fisher
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Kentucky represented by

Thomas Molnar Fisher
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Louisiana represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Mississippi represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Montana represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of North Dakota represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Oklahoma represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of South Carolina represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of South Dakota represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Tennessee represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE

ATTORNEY TO BE NOTICED

Amicus

State of Texas represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Utah represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of West Virginia represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Wyoming represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Amicus

State of Nebraska represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/02/2022	1	COMPLAINT against State of Idaho, filed by The United States. (Attachments: # 1 Cover Sheet, # 2 Cover Sheet Counsel attachment, # 3 Summons)(Newman, Lisa) (Attachment 1 cover sheet replaced with PDF that cannot be edited on 8/3/2022) (ac).
08/02/2022	2	NOTICE of Appearance by Anna Lynn Deffebach on behalf of All Plaintiffs (Deffebach, Anna)
08/02/2022	3	NOTICE of Appearance by Julie Straus Harris on behalf of The United States (Straus Harris, Julie)
08/03/2022	4	Summons Issued as to State of Idaho. (Print attached Summons for service.) (ac)
08/04/2022	5	NOTICE of Appearance by Daniel Schwei on behalf of United States of America (Schwei, Daniel)
08/04/2022	6	SUMMONS Returned Executed by United States of America. State of Idaho served on 8/2/2022, answer due 8/23/2022. (Newman, Lisa)
08/04/2022	7	NOTICE of Appearance by Christopher A. Eiswerth on behalf of United States of America (Eiswerth, Christopher)
08/04/2022	8	NOTICE of Appearance by Emily Nestler on behalf of United States of America (Nestler, Emily)

08/04/2022	9	NOTICE of Appearance by Megan Ann Larrondo on behalf of State of Idaho (Larrondo, Megan)
08/05/2022	10	NOTICE of Appearance by Brian David Netter on behalf of United States of America (Netter, Brian)
08/05/2022	11	NOTICE of Availability of Magistrate Judge and Requirement for Consent sent to counsel for State of Idaho, United States of America re 1 Complaint, 9 Notice of Appearance Consent/Objection to Magistrate due by 10/4/2022. (alw)
08/05/2022	12	NOTICE of Appearance by Steven Lamar Olsen on behalf of State of Idaho (Olsen, Steven)
08/05/2022	13	DOCKET ENTRY ORDER: In accordance with the agreement reached by the parties and discussed with the Court at an informal status conference, the following briefing schedule is ordered. The United States will file its motion for injunctive relief on Monday, August 8. The State of Idaho will file its response on Tuesday, August 16. The United States will file its reply brief by 12:00 pm MDT on Friday, August 19. The Court will have a hearing on the motion, which will be set by separate notice, on August 22. Signed by Judge B Lynn Winmill. (hgp)
08/05/2022	21	Docket Text Minute Entry for proceedings held before Judge B Lynn Winmill: A Status Conference was held via Zoom on 8/5/2022. Appearing on behalf of Plaintiff: Lisa Newman, Daniel Schwei, and Brian Netter. Appearing on behalf of Defendant: Megan Larrondo and Steve Olsen. The Court discussed a briefing schedule regarding Plaintiff's motion for injunctive relief (see Dkt. 13). Hearing was held informally and was not recorded. Time: 1:04−1:14p.m. (jlg) (Entered: 08/10/2022)
08/08/2022	14	ORDER. An amicus curiae supporting the United States of America must file its brief, accompanied by a motion for filing, no later than August 15, 2022. An amicus curiae supporting the State of Idaho must file its brief, accompanied by a motion for filing, no later than 12:00 MDT on August 19, 2022. An amicus curiae that does not support either party must file its brief no later than no later than 12:00 MDT on August 19, 2022. Signed by Judge B Lynn Winmill. (alw)
08/08/2022	15	Expedited MOTION to Intervene Daniel W. Bower, Monte N Stewart appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Responses due by 8/29/2022 (Attachments: # 1 Memorandum in Support of Motion to Intervene, # 2 Exhibit 1 Proposed Answer)(Bower, Daniel)
08/08/2022	16	MOTION to Expedite *Idaho Legislatures Motion to Intervene* Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Responses due by 8/29/2022 (Bower, Daniel)
08/08/2022	17	MOTION for Preliminary Injunction Lisa Newman appearing for Plaintiff United States of America. Responses due by 8/29/2022 (Attachments: # 1 Memorandum in Support, # 2 Proposed Order, # 3 Ex. A, Fleisher Declaration, # 4 Fleisher Appendix, Pt. 1, # 5 Fleisher Appendix, Pt. 2, # 6 Ex. B, Corrigan Declaration, # 7 Ex. C, Cooper Declaration, # 8 Ex. D, Seyb Declaration, # 9 Ex. E, Wright Declaration, # 10 Ex. F, Shadle Declaration, # 11 Ex. G, Newman Declaration, # 12 Newman Appendix, Pt. 1, # 13 Newman Appendix, Pt. 2)(Newman, Lisa)
08/09/2022	18	DOCKET ENTRY ORDER: The parties shall respond to the motion to intervene (Dkt. 15) by Wednesday, August 10, 2022. Signed by Judge B Lynn Winmill. (hgp)
08/09/2022	19	AMENDED ORDER re 14 Order. Signed by Judge B Lynn Winmill. (alw)
08/10/2022	20	NOTICE by State of Idaho re 15 Expedited MOTION to Intervene *State of Idaho's Non−Opposition* (Larrondo, Megan)
08/10/2022	22	DOCKET ENTRY NOTICE OF HEARING regarding 17 Motion for Preliminary Injunction: A Motion Hearing is set for 8/22/2022 at 9:30 AM in Boise − Courtroom 2 before Judge B Lynn Winmill. (jlg)
08/10/2022	23	RESPONSE to Motion re 15 Expedited MOTION to Intervene filed by United States of America. Replies due by 8/24/2022.(Deffebach, Anna)

08/11/2022	24	DOCKET ENTRY ORDER: If the Idaho Legislature wishes to file its optional reply brief in support of its motion to intervene (filed at Dkt. 15), it must do so by 5:00 p.m. Mountain Time today, August 11, 2022. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls)
08/11/2022	25	REPLY to Response to Motion re 15 Expedited MOTION to Intervene filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature.Motion Ripe Deadline set for 8/12/2022.(Bower, Daniel)
08/12/2022	26	NOTICE of Appearance by Brian V Church on behalf of State of Idaho (Church, Brian)
08/13/2022	27	MEMORANDUM DECISION AND ORDER granting in part and denying in part 15 Motion to Intervene. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls)
08/15/2022	28	DOCKET ENTRY ORDER: The Court amends its oral order, made during the informal status conference today, as follows: The Legislature's deadline for submitting affidavits in supports of its response shall be due by 12:00 p.m., Mountain Time, on Wednesday, August 17, 2022. The Legislature's deadline to submit its brief opposing the United States Motion for Preliminary Injunction shall remain the same: that brief is due on August 16, 2022. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls)
08/15/2022	29	AMENDED DOCKET ENTRY NOTICE OF HEARING regarding 17 Motion for Preliminary Injunction: The Motion Hearing set for 8/22/2022 is rescheduled to begin at 9:00 AM in Boise − Courtroom 2 before Judge B Lynn Winmill. (jlg)
08/15/2022	30	Minute Entry for proceedings held before Judge B Lynn Winmill: Video Status Conference was held on 8/15/2022. (Court Reporter Tammy Hohenleitner.) (jlg)
08/15/2022	31	NOTICE of Appearance by Joan Elizabeth Callahan on behalf of State of Idaho (Callahan, Joan)
08/15/2022	32	MOTION FOR PRO HAC VICE APPEARANCE by Laura Etlinger. (Filing fee $ 250 receipt number AIDDC−2435922.)Laura Etlinger appearing for Amicus Parties New York, State of, California, State of, Connecticut, State of, Colorado, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington, State of, Washington DC. Responses due by 9/6/2022 (Etlinger, Laura)
08/15/2022	33	MOTION FOR PRO HAC VICE APPEARANCE by Jay Alan Sekulow. (Filing fee $ 250 receipt number AIDDC−2436019.)Jay Alan Sekulow appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Sekulow, Jay)
08/15/2022	34	MOTION FOR PRO HAC VICE APPEARANCE by Jordan A. Sekulow. (Filing fee $ 250 receipt number AIDDC−2436031.)Jordan A. Sekulow appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Sekulow, Jordan)
08/15/2022	35	MOTION FOR PRO HAC VICE APPEARANCE by Stuart J. Roth. (Filing fee $ 250 receipt number AIDDC−2436050.)Stuart Roth appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Roth, Stuart)
08/15/2022	36	MEMORANDUM/BRIEF filed by United States of America *Regarding Live Testimony at August 22 Preliminary Injunction Hearing*. (Schwei, Daniel)
08/15/2022	37	MOTION FOR PRO HAC VICE APPEARANCE by Olivia F. Summers. (Filing fee $ 250 receipt number AIDDC−2436080.)Olivia F. Summers appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Summers, Olivia)
08/15/2022	38	DOCKET ENTRY ORDER approving 32 Motion for Pro Hac Vice Appearance of attorney Laura Etlinger for California, State of,Laura Etlinger for Colorado, State of,Laura Etlinger for Connecticut, State of,Laura Etlinger for Delaware, State of,Laura

		Etlinger for Hawaii, State of,Laura Etlinger for Illinois, State of,Laura Etlinger for Maine, State of,Laura Etlinger for Maryland, State of,Laura Etlinger for Massachusetts, State of,Laura Etlinger for Michigan, State of,Laura Etlinger for Minnesota, State of,Laura Etlinger for Nevada, State of,Laura Etlinger for New Jersey, State of,Laura Etlinger for New Mexico, State of,Laura Etlinger for New York, State of,Laura Etlinger for North Carolina, State of,Laura Etlinger for Oregon, State of,Laura Etlinger for Pennsylvania, State of,Laura Etlinger for Rhode Island, State of,Laura Etlinger for Washington DC,Laura Etlinger for Washington, State of Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/15/2022	39	MOTION for Leave to File *Brief as Amici Curiae* Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Attachments: # 1 Exhibit Ex. A to Motion for Leave to File Brief of Amici Curiae)(Olson, Wendy) Modified on 8/16/2022 to change party filed name (alw).
08/15/2022	40	MOTION FOR PRO HAC VICE APPEARANCE by Amanda K. Rice. (Filing fee $ 250 receipt number AIDDC−2436111.)Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Olson, Wendy) Modified on 8/16/2022 to change filing party name (alw).
08/15/2022	41	DOCKET ENTRY ORDER approving 33 34 35 36 Motion for Pro Hac Vice Appearance of attorney Jay Alan Sekulow,Jordan A. Sekulow,Stuart Roth,Olivia F. Summers for American Center for Law & Justice Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/15/2022	42	MOTION FOR PRO HAC VICE APPEARANCE by Jacob M. Roth. (Filing fee $ 250 receipt number AIDDC−2436117.)Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Olson, Wendy) Modified on 8/16/2022 to change filing party name (alw).
08/15/2022	43	MOTION FOR PRO HAC VICE APPEARANCE by Charlotte H. Taylor. (Filing fee $ 250 receipt number AIDDC−2436127.)Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Olson, Wendy) Modified on 8/16/2022 to change filing party name (alw).
08/15/2022	44	MEMORANDUM/BRIEF filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature *Regarding Live Testimony at August 22 Preliminary Injunction Hearing*. (Bower, Daniel)
08/15/2022	45	MOTION to File Amicus Brief Laura Etlinger appearing for Amicus Parties California, State of, Colorado, State of, Connecticut, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, New York, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington DC, Washington, State of. Responses due by 9/6/2022 (Attachments: # 1 Memorandum in Support proposed amicus brief)(Etlinger, Laura)
08/15/2022	46	MEMORANDUM/BRIEF filed by State of Idaho *re: letter brief requested by Dkt. 30.* (Church, Brian)
08/15/2022	47	MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Shannon Rose Selden. Shannon Rose Selden appearing for Amicus Parties American College of Emergency Physicians, Idaho Chapter of the American College of Emergency Physicians, American College of Obstetricians and Gynecologists, Society for Maternal−Fetal Medicine, National Medical Association, National Hispanic Medical Association, American Academy of Pediatrics, American Academy of Family Physicians, American Public Health Association, American Medical

		Association,. Responses due by 9/6/2022 (Selden, Shannon)
08/15/2022	48	MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Leah Martin. Leah S. Martin appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/6/2022 (Martin, Leah)
08/15/2022	49	MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Adam Aukland−Peck. Adam B. Aukland−Peck appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/6/2022 (Aukland−Peck, Adam)
08/15/2022	50	MOTION to File Amicus Brief *(UNOPPOSED)* Shannon Rose Selden appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/6/2022 (Attachments: # 1 Exhibit Brief of Amici Curiae in Support of Plaintiffs Motion for a Preliminary Injunction)(Selden, Shannon)
08/16/2022	51	ERRATA by Amicus Parties California, State of, Colorado, State of, Connecticut, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, New York, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington DC, Washington, State of re 45 MOTION to File Amicus Brief . (Attachments: # 1 Memorandum in Support corrected signature blocks on amicus brief and motion)(Etlinger, Laura)
08/16/2022	52	DOCKET ENTRY ORDER approving 40 42 43 Motion for Pro Hac Vice Appearance of attorney Amanda K Rice,Jacob M Roth,Charlotte H Taylor for The American Hospital Association,Amanda K Rice,Jacob M Roth,Charlotte H Taylor for The Association of American Medical Colleges Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/16/2022	53	MOTION FOR PRO HAC VICE APPEARANCE by Shannon Rose Selden. (Filing fee $ 250 receipt number AIDDC−2436424.)Shannon Rose Selden appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/6/2022 (Selden, Shannon)
08/16/2022	54	MOTION FOR PRO HAC VICE APPEARANCE by Leah Martin. (Filing fee $ 250 receipt number AIDDC−2436438.)Leah S. Martin appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/6/2022 (Martin, Leah)

08/16/2022	55	MOTION FOR PRO HAC VICE APPEARANCE by Adam Aukland−Peck. (Filing fee $ 250 receipt number AIDDC−2436445.)Adam B. Aukland−Peck appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/6/2022 (Aukland−Peck, Adam)
08/16/2022	56	DOCKET ENTRY ORDER: 39 The American Hospital Association and The Association of American Medical Colleges' Motion for Leave to File Brief as Amici Curiae is GRANTED. Amici are directed to formally file their [39−1] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)
08/16/2022	57	DOCKET ENTRY ORDER: 45 The States of California, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Washington, and Washington, D.C.'s Motion to file Amicus Brief is GRANTED. Amici States are directed to formally file their Proposed Brief [45−1]. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)
08/16/2022	58	DOCKET ENTRY ORDER: 50 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, Society for Maternal−Fetal Medicine's Motion to file Amicus Brief is GRANTED. Amici are directed to formally file their [50−1] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)
08/16/2022	59	RESPONSE to Motion re 17 MOTION for Preliminary Injunction filed by California, State of, Colorado, State of, Connecticut, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, New York, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington DC, Washington, State of. Replies due by 8/30/2022.(Etlinger, Laura)
08/16/2022	60	DOCKET ENTRY ORDER approving 53 54 55 Motion for Pro Hac Vice Appearance of attorney Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for American Academy of Family Physicians,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for American Academy of Pediatrics,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for American College of Emergency Physicians,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for American College of Obstetricians and Gynecologists,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for American Medical Association,,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for American Public Health Association,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for Idaho Chapter of the American College of Emergency Physicians,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for National Hispanic Medical Association,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for National Medical Association,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland−Peck for Society for Maternal−Fetal Medicine Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/16/2022	61	MOTION FOR PRO HAC VICE APPEARANCE by Laura B. Hernandez. (Filing fee $ 250 receipt number AIDDC−2436596.)Laura Hernandez appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Hernandez, Laura)
08/16/2022	62	RESPONSE to Motion re 17 MOTION for Preliminary Injunction filed by 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, Society for Maternal−Fetal Medicine. Replies due by 8/30/2022.(Selden, Shannon)
08/16/2022	63	RESPONSE re 17 MOTION for Preliminary Injunction filed by The American Hospital Association, The Association of American Medical Colleges */Amicus Brief re Docket 39*. (Olson, Wendy)
08/16/2022	64	DOCKET ENTRY ORDER approving 61 Motion for Pro Hac Vice Appearance of attorney Laura Hernandez for American Center for Law & Justice Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/16/2022	65	MEMORANDUM in Opposition re 17 MOTION for Preliminary Injunction filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Replies due by 8/30/2022.(Bower, Daniel)
08/16/2022	66	RESPONSE to Motion re 17 MOTION for Preliminary Injunction filed by State of Idaho. Replies due by 8/30/2022. (Attachments: # 1 Declaration of Kraig White MD, # 2 Declaration of Randy Rodriguez)(Church, Brian)
08/17/2022	67	MOTION FOR PRO HAC VICE APPEARANCE by Jeffrey B. Dubner. (Filing fee $ 250 receipt number AIDDC−2437111.)Jeffrey B. Dubner appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/7/2022 (Dubner, Jeffrey)
08/17/2022	68	MOTION FOR PRO HAC VICE APPEARANCE by John T. Lewis. (Filing fee $ 250 receipt number AIDDC−2437139.)John Lewis appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/7/2022 (Lewis, John)
08/17/2022	69	MOTION for Leave to File *LEGAL ARGUMENTS* Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Responses due by 9/7/2022 (Attachments: # 1 Exhibit Legislatures unique legal arguments)(Bower, Daniel)
08/17/2022	70	DOCKET ENTRY ORDER approving 67 68 Motion for Pro Hac Vice Appearance of attorney John Lewis,Jeffrey B. Dubner for American Academy of Family Physicians,John Lewis,Jeffrey B. Dubner for American Academy of Pediatrics,John Lewis,Jeffrey B. Dubner for American College of Emergency Physicians,John Lewis,Jeffrey B. Dubner for American College of Obstetricians and Gynecologists,John Lewis,Jeffrey B. Dubner for American Medical Association,,John Lewis,Jeffrey B. Dubner for American Public Health Association,John Lewis,Jeffrey B. Dubner for Idaho Chapter of the American College of Emergency Physicians,John Lewis,Jeffrey B. Dubner for National Hispanic Medical Association,John Lewis,Jeffrey B. Dubner for National Medical Association,John Lewis,Jeffrey B. Dubner for Society for Maternal−Fetal Medicine Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/17/2022	71	AFFIDAVIT in Opposition re 17 MOTION for Preliminary Injunction filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Replies due by 8/31/2022. (Attachments: # 1 Affidavit Reynolds Declaration, # 2 Affidavit Harder

		Declaration, # 3 Exhibit Idaho Report of Induced Termination of Pregnancy, # 4 Exhibit Idaho Abortion Reporting Response, # 5 Affidavit French Declaration, # 6 Affidavit Loebs Declaration)(Bower, Daniel)
08/17/2022	72	NOTICE of Appearance by Alan Wayne Foutz on behalf of State of Idaho (Foutz, Alan)
08/17/2022	73	MEMORANDUM DECISION AND ORDER. Legislatures request for an evidentiary hearingis DENIED. Signed by Judge B Lynn Winmill. (alw)
08/17/2022	74	MOTION to File Amicus Brief Olivia F. Summers appearing for Amicus American Center for Law & Justice. Responses due by 9/7/2022 (Attachments: # 1 Memorandum in Support, # 2 Proposed Order)(Summers, Olivia)
08/17/2022	75	DOCKET ENTRY ORDER: Before the Court is the Idaho Legislature's Motion for Leave to File Legal Arguments 69 . Having considered the Legislature's Motion, the Court declines at this juncture to modify the conditions it imposed in its earlier Order 27 allowing the Legislature to permissively intervene. Allowing the Legislature to file an additional brief past the deadline of the expedited briefing schedule would unduly prejudice the United States, which must file its reply brief by 12:00 pm MST, on August 19, 2022. In addition, the Legislatures total briefing would exceed not only the 15−page limit imposed by the Court but would also exceed the 20−page limit imposed by the Local Rules to which both the United States and the State of Idaho have adhered. IT IS THEREFORE ORDERED that the Legislature's Motion for Leave to File Legal Arguments 69 is DENIED. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)
08/17/2022	76	DOCKET ENTRY ORDER: The American Center for Law & Justice's 74 Motion for Leave to file Amicus Brief in Support of Defendant's Response to Plaintiff's Motion for Preliminary Injunction is GRANTED. The ACLJ is directed to formally file its [74−1] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)
08/17/2022	77	MOTION for Extension of Time to File Answer *or Otherwise Respond (unopposed)* Brian V Church appearing for Defendant State of Idaho. Responses due by 9/7/2022 (Attachments: # 1 Memorandum in Support)(Church, Brian)
08/17/2022	78	DOCKET ENTRY ORDER GRANTING Motion for Extension of Time to Answer or Otherwise Respond (Dkt. 77). The State of Idaho shall answer or other respond by September 23, 2022. Signed by Judge B Lynn Winmill. (hgp)
08/18/2022	79	Minute Entry for proceedings held before Judge B Lynn Winmill: An informal Video Status Conference was held on 8/18/2022. (Court Reporter/ESR Not recorded.) Hearing Not Recorded. (jlg)
08/18/2022	80	MEMORANDUM/BRIEF re 76 Order on Motion to File Amicus Brief, 74 MOTION to File Amicus Brief filed by American Center for Law & Justice *Amicus Brief in Support of Defendant's Response*. (Summers, Olivia)
08/18/2022	81	MOTION FOR PRO HAC VICE APPEARANCE by Thomas M. Fisher. (Filing fee $ 250 receipt number AIDDC−2437960.)Thomas Molnar Fisher appearing for Amicus State of Indiana. Responses due by 9/8/2022 (Fisher, Thomas)
08/19/2022	82	MOTION FOR PRO HAC VICE APPEARANCE by Maher Mahmood. (Filing fee $ 250 receipt number AIDDC−2438637.)Maher Mahmood appearing for Amicus Parties 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, Society for Maternal−Fetal Medicine. Responses due by 9/9/2022 (Mahmood, Maher)
08/19/2022	83	DOCKET ENTRY ORDER approving 81 Motion for Pro Hac Vice Appearance of attorney Thomas Molnar Fisher for State of Indiana Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the

		addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/19/2022	84	DOCKET ENTRY ORDER approving 82 Motion for Pro Hac Vice Appearance of attorney Maher Mahmood for American Academy of Family Physicians,Maher Mahmood for American Academy of Pediatrics,Maher Mahmood for American College of Emergency Physicians,Maher Mahmood for American College of Obstetricians and Gynecologists,Maher Mahmood for American Medical Association,,Maher Mahmood for American Public Health Association,Maher Mahmood for Idaho Chapter of the American College of Emergency Physicians,Maher Mahmood for National Hispanic Medical Association,Maher Mahmood for National Medical Association,Maher Mahmood for Society for Maternal−Fetal Medicine Per Local Rule 83.4(e), out−of−state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)
08/19/2022	85	AMENDED DOCUMENT by State of Indiana. *Application for Admission Pro Hac Vice on behalf of States of Indiana, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.* (Fisher, Thomas)
08/19/2022	86	REPLY to Response to Motion re 17 MOTION for Preliminary Injunction filed by United States of America.Motion Ripe Deadline set for 8/22/2022. (Attachments: # 1 Exhibit List, # 2 Ex. H, Supplemental Fleisher Declaration, # 3 Ex. I, Supplemental Corrigan Declaration, # 4 Ex. J, Huntsberger Declaration, # 5 Ex. K, Supplemental Cooper Declaration, # 6 Ex. L)(Newman, Lisa)
08/19/2022	87	MOTION for Leave to File *Brief of Indiana and 16 Other States as Amici Curiae in Support of Defendant* Thomas Molnar Fisher appearing for Amicus State of Indiana. Responses due by 9/9/2022 (Attachments: # 1 Exhibit Text of Proposed Order, # 2 Memorandum in Support)(Fisher, Thomas)
08/19/2022	88	DOCKET ENTRY NOTICE OF HEARING regarding 17 MOTION for Preliminary Injunction: A Motion Hearing is set for 8/22/2022 at 9:00 AM in Boise − Courtroom 2 before Judge B Lynn Winmill. Members of the public may attend the hearing remotely. Remote access will be audio only − there will not be video. To access an audio feed from the hearing, members of the public may call this number: 208−684−0990. Then, when they are prompted for the conference ID, they should enter 238 965 497#.(jlg)
08/19/2022	89	DOCKET ENTRY ORDER: 87 Unopposed Motion for Leave to File Brief of Indiana and 16 Other States as Amici Curiae in Support of Defendant is GRANTED. Amici are directed to file their [87−2] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)
08/19/2022	90	MEMORANDUM/BRIEF re 89 Order on Motion for Leave to File, filed by State of Alabama, State of Arkansas, State of Indiana, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of North Dakota, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of Texas, State of Utah, State of West Virginia, State of Wyoming, State of Nebraska. (Fisher, Thomas) Modified on 8/25/2022 to add party (alw).
08/19/2022	91	NOTICE by State of Idaho *Notice of Appearance Special Deputy Attorney General Clay R. Smith* (Church, Brian)
08/22/2022	92	Minute Entry for proceedings held before Judge B Lynn Winmill: A Motion Hearing was held on 8/22/2022 re 17 MOTION for Preliminary Injunction filed by United States of America. A written decision is forthcoming. (Court Reporter Tammy Hohenleitner.) (jlg)
08/22/2022	93	RESPONSE filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature *Objection to Proposed Order [Dkt. 17−2].* (Attachments: # 1 Exhibit 1 Proposed Fall−Back Order − redline, # 2 Exhibit 2 Proposed Fall−Back Order − clean, # 3 Exhibit 3 EMTALA)(Bower, Daniel)

08/24/2022	94	NOTICE by State of Idaho *of Supplemental Authority* (Attachments: # 1 Exhibit Exhibit A − U.S. District Court for Northern District of Texas Decision)(Church, Brian)
08/24/2022	95	MEMORANDUM DECISION AND ORDER. IT IS ORDERED that: Plaintiff's motion for a preliminary injunction (Dkt. 17) is GRANTED. This preliminary injunction is effective immediately and shall remain in full force and effect through the date on which judgment is entered in this case. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (km)
08/25/2022	96	Notice of Filing of Official Transcript of Proceedings held on 8/22/22 before Judge B. Lynn Winmill. Court Reporter Tamara Hohenleitner, Email tammy_hohenleitner@id.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. This transcript is not available to the general public and as such is sealed until release of transcript restriction re 92 Motion Hearing. Redaction Request due 9/15/2022. Redacted Transcript Deadline set for 9/26/2022. Release of Transcript Restriction set for 11/23/2022. (th)
09/07/2022	97	MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Responses due by 9/28/2022 (Attachments: # 1 Memorandum in Support)(Bower, Daniel)
09/15/2022	98	NOTICE by United States of America *of Factual Clarification* (Attachments: # 1 Affidavit of Dr. Fleisher (Second Supplemental))(Schwei, Daniel)
09/15/2022	99	MOTION for Extension of Time to File Response/Reply as to 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, Christopher A. Eiswerth appearing for Plaintiff United States of America. Responses due by 10/6/2022 (Attachments: # 1 Exhibit A −− Correspondence)(Eiswerth, Christopher)
09/16/2022	100	RESPONSE to Motion re 99 MOTION for Extension of Time to File Response/Reply as to 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, *Partial Non−Opposition* filed by State of Idaho. Replies due by 9/30/2022.(Church, Brian)
09/21/2022	101	MOTION for Reconsideration Brian V Church appearing for Defendant State of Idaho. Responses due by 10/12/2022 (Attachments: # 1 Memorandum in Support of State of Idaho's Motion to Reconsider)(Church, Brian)
09/22/2022	102	ORDER. Upon consideration of the United States Motion to Extend Briefing Schedule Regarding Motions for Reconsideration, and finding good cause, IT IS ORDERED that the United States motion is GRANTED. Signed by Judge B Lynn Winmill. (alw)
09/23/2022	103	ANSWER to 1 Complaint, by State of Idaho.(Church, Brian)
09/28/2022	104	RESPONSE to Motion re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, *(Non−Opposition)* filed by State of Idaho. Replies due by 10/12/2022.(Church, Brian)
10/04/2022	105	MOTION to Intervene Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Responses due by 10/25/2022 (Attachments: # 1 Memorandum in Support of Renewed Motion to Intervene)(Bower, Daniel)
10/12/2022	106	MEMORANDUM in Opposition re 101 MOTION for Reconsideration , 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, filed by United States of America. Replies due by 10/26/2022.(Eiswerth, Christopher)
10/19/2022	107	Joint MOTION modification of briefing schedule of Idaho Legislatures Renewed Motion to Intervene re 105 MOTION to Intervene Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho

		Legislature. Responses due by 11/9/2022 (Attachments: # 1 Exhibit)(Bower, Daniel)
10/20/2022	108	DOCKET ENTRY ORDER granting 107 Motion. Good cause appearing, the briefing schedule on the Legislature's Renewed Motion to Intervene (Dkt. 105) is modified as follows: Responses shall be filed by October 20, 2022. The optional reply brief shall be filed by October 27, 2022. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls))
10/20/2022	109	MEMORANDUM in Opposition re 105 MOTION to Intervene filed by United States of America. Replies due by 11/3/2022.(Deffebach, Anna)
10/20/2022	110	RESPONSE to Motion re 105 MOTION to Intervene filed by State of Idaho. Replies due by 11/3/2022.(Olsen, Steven)
10/26/2022	111	REPLY to Response to Motion re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature.Motion Ripe Deadline set for 10/27/2022.(Bower, Daniel)
10/26/2022	112	REPLY to Response to Motion re 101 MOTION for Reconsideration filed by State of Idaho.Motion Ripe Deadline set for 10/27/2022.(Church, Brian)
10/27/2022	113	REPLY to Response to Motion re 105 MOTION to Intervene filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature.Motion Ripe Deadline set for 10/28/2022.(Bower, Daniel)
10/28/2022	114	NOTICE by State of Idaho *of Withdrawal of Counsel* (Larrondo, Megan)
11/17/2022	115	NOTICE by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, , 105 MOTION to Intervene (Bower, Daniel)
12/13/2022	116	NOTICE by State of Idaho *of Withdrawal of Counsel* (Reed, Dayton)
12/14/2022	117	NOTICE by State of Idaho *of Withdrawal of Counsel* (Batey, Ingrid)
12/30/2022	118	NOTICE by State of Idaho *of withdrawal of Special Deputy Attorney General Clay R. Smith* (Church, Brian)
01/13/2023	119	MOTION Permission to File Supplemental Briefing *and Notice of Supplemental Authority* Brian V Church appearing for Defendant State of Idaho. Responses due by 2/3/2023 (Attachments: # 1 Memorandum in Support of Request for Permission to File Supplemental Briefing, # 2 Planned Parenthood Decision)(Church, Brian)
01/13/2023	120	MOTION to Stay *Issuance of a Decision* Brian V Church appearing for Defendant State of Idaho. Responses due by 2/3/2023 (Attachments: # 1 Memorandum in Support of Motion to Stay Issuance of a Decision)(Church, Brian)
01/13/2023	121	JOINDER by Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature joining 119 MOTION Permission to File Supplemental Briefing *and Notice of Supplemental Authority*, 120 MOTION to Stay *Issuance of a Decision* . (Attachments: # 1 Exhibit 1 Planned Parenthood Decision)(Bower, Daniel)
01/24/2023	122	DOCKET ENTRY ORDER granting 119 State of Idaho's Motion for Permission to File Supplemental Briefing on the State's pending motion for reconsideration 101 . The State of Idaho may file a supplement brief in support of its motion for reconsideration not to exceed 10 pages no later than February 6, 2023. As the Idaho Legislature has joined in the motion, it may also file a separate brief in support of its motion for reconsideration not to exceed 10 pages by February 6, 2023. In response, the United States of America may file two briefs responding to each supplemental brief filed by the State and the Legislature not to exceed ten pages each, or one omnibus response brief not to exceed 20 pages by February 21, 2023. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)

01/24/2023	123	DOCKET ENTRY ORDER: IT IS ORDERED that 120 the State of Idaho's Motion to Stay Issuance of a Decision is GRANTED. The Court will not issue a decision on the pending motions to reconsider until the supplemental briefing has been completed on February 21, 2023, and the Court has had adequate time to consider the additional argument. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)
01/24/2023	124	NOTICE by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature *of Automatic Substitution of Certain Intervenor−Defendants* (Bower, Daniel)
02/03/2023	125	MEMORANDUM DECISION AND ORDER. Idaho Legislatures Renewed Motion to Intervene (Dkt. 105) is DENIED. Signed by Judge B Lynn Winmill. (alw)
02/06/2023	126	MEMORANDUM in Support re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. (Attachments: # 1 Exhibit 1)(Bower, Daniel)
02/06/2023	127	SUPPLEMENT by Defendant State of Idaho *Supplemental Brief Supporting State of Idaho's Motion for Reconsideration*. (Olsen, Steven)
02/06/2023	128	MOTION to Take Judicial Notice Steven Lamar Olsen appearing for Defendant State of Idaho. Responses due by 2/27/2023 (Attachments: # 1 Exhibit 1)(Olsen, Steven)
02/21/2023	129	NOTICE of Appearance by Lincoln Davis Wilson on behalf of State of Idaho (Wilson, Lincoln)
02/21/2023	130	SUPPLEMENT by Plaintiff United States of America re 101 MOTION for Reconsideration , 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, *United States' Supplemental Brief in Opposition to the Motions for Reconsideration*. (Deffebach, Anna)
03/02/2023	131	NOTICE OF APPEAL as to 125 Memorandum Decision, Terminate Motions by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. Filing Fee Paid. $ 505, receipt number AIDDC−2530532. (Notice sent to Court Reporter & 9th Cir) (Bower, Daniel)
03/03/2023	132	USCA Case Number 23−35153 for 131 Notice of Appeal, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. (alw)
03/03/2023	133	USCA Scheduling Order 23−35153 as to 131 Notice of Appeal, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature. (Notice sent by e−mail to Court Reporter) (alw)