Nos. 23-35440 & 23-35450

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO
Defendant,
v.
MIKE MOYLE, Speaker of the Idaho House of Representatives; et al.,
Intervenors-Appellants

Appeal from the United States District Court
for the District of Idaho
Honorable B. Lynn Winmill
(1:22-cv-00329-BLW)

IDAHO LEGISLATURE'S EXCERPTS OF RECORD INDEX VOLUME

Monte Neil Stewart
11000 Cherwell Court
Las Vegas, NV 89144
Telephone: (208) 514-6360
monteneilstewart@gmail.com

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

Counsel for Intervenors-Appellants

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/s/ Daniel W. Bower

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

Monte Neil Stewart
11000 Cherwell Court
Las Vegas, NV 89144
Telephone: (208) 514-6360
monteneilstewart@gmail.com

Counsel for Intervenors – Appellants

August 7, 2023

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Monte Neil Stewart
11000 Cherwell Court
Las Vegas, NV 89144
Telephone: (208) 514-6360
monteneilstewart@gmail.com

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

Counsel for Intervenors-Appellants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant, 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 **MEMORANDUM DECISION AND ORDER**

INTRODUCTION

Idaho Code § 18-622 makes it a felony for anyone to perform or attempt to perform or assist with an abortion. Idaho Code § 18-622(2). The law, which the Idaho Supreme Court refers to as the "Total Abortion Ban," criminalizes *all* abortions, without exception – offering only the "cold comfort" of two narrow affirmative defenses. *Memorandum Decision and Order dated August 24, 2022*, p. 1, Dkt. 95. As relevant here,

an accused physician may avoid *conviction* when the physician determines in her good faith medical judgment that the abortion is necessary to prevent the death of a pregnant woman. *Id.* § 18- 622(3). The affirmative defense does not protect a physician who performs an abortion "merely" to prevent serious harm to the patient, rather than to save her life. Nor does the affirmative defense insulate the physician from criminal *prosecution* under any circumstances. Instead, it shifts the burden of proof from the prosecution to the criminal defendant to prove at trial that the abortion was necessary to prevent the death of the mother – in a sense, presuming the defendant guilty until she proves herself innocent.

The Total Abortion Ban, even before it went into effect, has engendered various legal challenges in both federal and state court. In this Court, the United States sued to enjoin the ban to the extent it conflicted with the federal Emergency Medical Treatment and Labor Act ("EMTALA"), which requires hospitals that accept Medicare funds to offer stabilizing treatment—including, in some cases, treatment that would be considered an abortion—to patients who present at emergency departments with emergency medical conditions. Because the Total Abortion Ban criminalizes medical care that federal law requires hospitals to offer, this Court enjoined Idaho Code § 18-622 to the extent it conflicts with EMTALA. *See Memorandum Decision and Order, dated August 24, 2022* ("*August 24, 2022 Injunction"*). Rather than appealing this decision the State of Idaho and the Idaho Legislature have filed motions for reconsideration, which are now pending before the Court. (Dkt. 97 & 101).

Parallel to this litigation, a challenge to the constitutionality of the ban under the Idaho Constitution proceeded separately before the Idaho Supreme Court. *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. State ("Planned Parenthood")*, Idaho Supreme Court Docket No. 49817-2022 (Idaho June 27, 2022) (Petition for Writ of Prohibition). On January 5, 2023, while the motions for reconsideration remained pending, the Idaho Supreme Court issued its decision in *Planned Parenthood*, upholding the constitutionality of the Total Abortion Ban under the Idaho Constitution. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (2023). The Idaho Supreme Court also construed the scope of Idaho's Total Abortion Ban in rendering its decision.

After the Idaho Supreme Court issued its decision in *Planned Parenthood*, both the State and the Legislature requested to file supplemental briefing in support of their motions for reconsideration. This Court granted their request. Now, in addition to their arguments raised in their initial round of briefing, both the State and the Legislature argue that the *Planned Parenthood* decision eliminated any conflict between EMTALA and the Total Abortion Ban, obviating any need for the preliminary injunction entered in this case. *See* Dkts. 126, 127. As explained below, the Court will deny the motions for reconsideration.

ANALYSIS

1. Motion to Reconsider Standard

"Reconsideration is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 540 F. Supp. 2d 1176, 1179 (D. Or. 2008) (quoting *Kona Enterprises,*

Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000)) (internal quotation marks omitted); *see also Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). A motion to reconsider should therefore be granted only if the moving party can show an intervening change in controlling law, new evidence has become available, or the district court committed clear error, or the initial decision was manifestly unjust. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California*, 649 F.Supp.2d 1063, 1069-70 (E.D. Cal. 2009) (citing *Sch. Dist. No. 1J Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

"Motions for reconsideration are generally disfavored, and, in the absence of new evidence or change in the law, a party may not use a motion to reconsider to present new arguments or evidence that could have been raised earlier." *Adidas*, 540 F. Supp. 2d at 1180 (citing *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991)). "Motions to reconsider are also not vehicles permitting the unsuccessful party to 'rehash' arguments previously presented." *Cachil Dehe Band*, 649 F. Supp. 2d at 1069–70 (quoting *United States v. Navarro*, 972 F.Supp. 1296, 1299 (E.D.Cal.1997), *rev'd on other grounds*, 160 F.3d 1254 (9th Cir. 1998) (internal quotation marks omitted)). "Ultimately, a party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Id.* (quoting *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1131 (E.D.Cal. 2001). (internal quotation marks omitted)).

2. The Legislature and State Fail to Meet the Demanding Standard for Reconsideration in their Initial Briefing.

The Legislature and the State's motions fail to meet the demanding standard the Ninth Circuit has set for succeeding on reconsideration. In their original round of briefing on their motions to reconsider, the Legislature and the State do not identify an intervening change in controlling law or newly discovered evidence. Instead, they argue that this Court "committed clear error or made a decision that was manifestly unjust" when it granted the United States' motion for preliminary injunction. But then the Legislature and the State simply proceed in rehashing arguments previously presented or in making additional arguments that they could have raised earlier.

To the extent the Legislature and the State merely express their disagreement with the Court's decision and recapitulate the cases and arguments considered by the Court before rendering its initial decision, they have failed to carry their heavy burden on reconsideration. The Court will therefore deny their motions to reconsider on any of the grounds raised in their initial round of briefing. To the extent, however, the Idaho Supreme Court decision in *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (2023), somewhat altered the legal landscape since the Court issued its preliminary injunction, it merits some discussion.

3. The *Planned Parenthood* Decision Did Not Negate the Fundamental Principles Underpinning the Court's Preliminary Injunction.

In their supplemental briefing, the Legislature and the State suggests the Idaho Supreme Court's decision in *Planned Parenthood* amounts to an intervening change of controlling law, warranting reconsideration of the Court's preliminary injunction order.

They argue the Idaho Supreme Court "defined the scope of Idaho Code § 18-622 in at least two ways that conflict with this Court's interpretation of that law," upending this Court's analysis finding a conflict between the Total Abortion Ban and EMTALA. *See Id's Supp. Br.*, Dkt. 127. The Court disagrees.

In its preliminary injunction decision, the Court concluded that the Total Abortion Ban conflicts with EMTALA under principles of both impossibility and obstacle preemption. *August 24, 2022 Injunction*, pp. 19-34, Dkt. 95. First, the Court determined that, by virtue of the Total Abortion Ban's affirmative defense structure, "it is impossible to comply with both laws" because "federal law requires the provision of care and state law criminalizes that very care." *Id.* at 19. Second, this Court found that "the plain language of the statutes demonstrates that EMTALA requires abortions that the affirmative defense would not cover." *Id*. at 20. And third, this Court concluded that "Idaho's criminal abortion law will undoubtedly deter physicians from providing abortions in some emergency situations," which "would obviously frustrate Congress's intent to ensure adequate emergency care for all patients who turn up in Medicare-funded hospitals." *Id.* at 26.

In the *Planned Parenthood* decision, the Idaho Supreme Court confirmed that: (1) Idaho Code § 18-622 criminalizes *all* abortions, 522 P.3d at 1152 ("Unlike Idaho's historical abortion laws, which provided an exception to 'save' or 'preserve' the life of the woman, the Total Abortion Ban makes all 'abortions' a crime."); (2) the affirmative defense covers a narrower set of circumstances than those in which EMTALA requires a

hospital to offer stabilizing treatment, *id.* at 1196 (noting Idaho Code § 18-622 "does *not* include the broader 'medical emergency' exception for abortions" contained in Idaho Code § 18-8804(1)); and (3) a provider's invocation of the affirmative defense may still be challenged at trial, after the provider has been charged, arrested, and potentially detained, and thus will continue to deter the provision of medically necessary abortions, *id.* (noting "a physician who performed an "abortion' …could be charged, arrested, and confined until trial *even if* the physician initially claims they did it to preserve the life of the mother….[and] "[o]nly later, at trial, would the physician be able to raise the affirmative defenses available in the Total Abortion Ban").

In other words, the Idaho Supreme Court's decision in *Planned Parenthood* confirms each of the fundamental principles that underpinned this Court's decision enjoining Idaho Code § 18-622 to the extent it conflicts with EMTALA; it therefore does not provide a basis for this Court to reconsider its decision. By contrast, the aspects of the Idaho Supreme Court's decision on which the State and Legislature focus—i.e., that the affirmative defense is subjective rather than objective, and that the Total Abortion Ban does not apply to ectopic or other nonviable pregnancies—do not fundamentally alter this Court's preemption analysis.

The Idaho Supreme Court held that the necessary-to-prevent-death affirmative defense "does not require *objective* certainty" nor "a particular level of immediacy" before the abortion can be "necessary" to prevent a pregnant woman's death. *Planned Parenthood*, 522 P.3d at 1203. Thus, according to the State, because the affirmative

defense is "subjective" rather than objective, "there is no conflict" between the Total Abortion Ban and EMTALA because the ban "does not require a 'medically impossible' determination that a pregnant woman is certain to die without an abortion," and neither does it promote delays or worsened patient outcomes by encouraging physicians to wait to provide care until a pregnant woman is nearer to death. *Id. Supp. Br.*, pp. 1-2, Dkt. 127.

First, this argument ignores – as the Idaho Supreme Court decision makes clear – that "the Total Abortion Ban makes all 'abortions' a crime," and "a physician who perform[s] an 'abortion'… [can] be charged, arrested, and confined until trial *even if* the physician initially claims they did it to preserve the life of the mother." *Planned Parenthood*, 522 P.3d at 78 (emphasis in original). "Only later, at trial, would the physician be able to raise the affirmative defenses available under the Total Abortion Ban…to argue it was a *justifiable* abortion that warrants acquittal and release." *Id.* This is true regardless of whether the affirmative defense is "subjective" or "objective." It also remains true that EMTALA requires physicians to offer medical care that state law criminalizes. Thus, the Idaho Supreme Court's decision, as consistent with this Court's holding, confirmed – rather than eliminated – the conflict between EMTALA and the Total Abortion Ban: Because "federal law requires the provision of care and state law criminalizes that very care, it is impossible to comply with both laws" and the state law is preempted. *August 24, 2022 Injunction*, p. 19, Dkt. 95.

Second, this argument ignores a second key rationale undergirding this Court's preliminary injunction decision: the affirmative defense applies to a narrower scope of

conduct than EMTALA covers. *August 24, 2022 Injunction*, p. 20, Dkt. 95. A physician may only assert the affirmative defense at trial when "the abortion was necessary to prevent the death of the pregnant woman." I.C. § 18-622(3)(a)(ii). But EMTALA requires providing stabilizing care not just when the patient faces death, but also when a patient faces serious health risks that may stop short of death, including permanent and irreversible health risks and impairment of bodily functions. 42 U.S.C. § 1395dd(e)(1)(A). As the Court explained in its decision, the pregnant patient may face grave risks to her health, "such as severe sepsis requiring limb amputation, uncontrollable uterine hemorrhage requiring hysterectomy, kidney failure requiring lifelong dialysis, or hypoxic brain injury" – but if the pregnant patient does not face death, the ban's affirmative defense offers no protection to a physician who performs an abortion. *August 24, 2022 Injunction*, pp. 2-3, 20, Dkt. 95. The Idaho Supreme Court confirmed as much when it noted that the Total Abortion Ban "does not include the broader 'medical emergency' exception for abortions present in [another Idaho abortion statute]." *Planned Parenthood*, 522 P.3d at 1196. The lack of such an exception, or even affirmative defense, is yet another reason that a conflict exists between EMTALA and § 18-622. *August 24, 2022 Injunction*, p. 20, Dkt. 95. Again, the subjective nature of the affirmative defense does not change this result, given that the *Planned Parenthood* decision did not expand the scope of the defense to include health-threatening conditions.

Likewise, the Idaho Supreme Court's narrowing the scope of the Total Abortion Ban to exclude ectopic and other "non-viable pregnancies" did not eliminate the conflict

between Idaho law and EMTALA. In *Planned Parenthood*, contrary to this Court's interpretation, the Idaho Supreme Court applied a "limiting judicial construction, consistent with apparent legislative intent" to conclude that § 18-622 does not "contemplate ectopic pregnancies" or other "non-viable pregnancies." *Id.* at 1202-1203. Both the State and the Legislature argue that this limiting construction eliminates any conflict between EMTALA and the Total Abortion Ban by pointing to the United States' examples involving ectopic pregnancies. *Leg.'s Supp. Br.*, p. 2, Dkt. 126, *Id. Supp. Br.*, pp. 7-8, Dkt. 127. But this Court's decision finding a conflict between § 18-622 and EMTALA did not rest on its conclusion that the ban encompasses ectopic pregnancies.

In its decision enjoining the Total Abortion Ban, this Court pointed to "many other complications," in addition to ectopic pregnancy, that "may place the patient's health in serious jeopardy or threaten bodily functions." *August 24, 2022 Injunction*, p. 8, Dkt. 95. As noted by the Court in its decision, "[s]ome 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. at 8-9 (citing *Fleisher Dec.* ¶¶ 15-22, Dkt. 17-3). In each of these scenarios, the stabilizing care EMTALA requires a physician to offer may include terminating a-still developing pregnancy covered under the Idaho Supreme Court's more limited definition of "abortion." Thus, the exclusion of ectopic and other nonviable pregnancies from the Total Abortion Ban does not negate the continuing need to enjoin the ban to the extent it still clearly conflicts with EMTALA.

In short, the Court finds no reason to reconsider its decision granting the United States' motion for a preliminary injunction, and the injunction stands. To contest the preliminary injunction, the State and the Legislature may appeal and seek remedy with the Ninth Circuit. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) ("So I'm going to deny your motion and let's let the law lords of the Ninth Circuit reach a judgment.").

ORDER

IT IS ORDERED that:

1. The Idaho Legislature's Motion for Reconsideration of Order Granting Preliminary Injunction (Dkt. 97) is **DENIED**.
2. The State of Idaho's Motion to Reconsider Preliminary Injunction (Dkt. 101) is **DENIED.**

DATED: May 4, 2023

B. Lynn Winmill
U.S. District Court Judge

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

[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

Nos. 23-35440 & 23-35450

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO
Defendant,
v.
MIKE MOYLE, Speaker of the Idaho House of Representatives; et al.,
Intervenors-Appellants

Appeal from the United States District Court
for the District of Idaho
Honorable B. Lynn Winmill
(1:22-cv-00329-BLW)

IDAHO LEGISLATURE'S EXCERPTS OF RECORD
VOLUME 2 OF 4

Monte Neil Stewart
11000 Cherwell Court
Las Vegas, NV 89144
Telephone: (208) 514-6360
monteneilstewart@gmail.com

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

Counsel for Intervenors-Appellants

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

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

Attorneys for Defendant-Intervenor Idaho Legislature

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
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 STAY PRELIMINARY INJUNCTION [Dkt. 95] PENDING APPEAL**

The Speaker of the Idaho House of Representatives Mike Moyle, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Seventh Legislature respectfully move this Court for a stay of its orders dated August 24, 2022 (Dkt. 95) (August Order) and May 4, 2023 (Dkt. 135) (May Order), pending disposition of an appeal to the United

States Court of Appeals for the Ninth Circuit and proceedings, if any, before the Supreme Court of the United States.

DISCUSSION

This motion requests a stay of the preliminary injunction reaffirmed in the Court's August Order and May Order, pending appellate review.

Issuing a stay is appropriate when the moving party meets four conditions. (1) Has it made "a strong showing that [it] is likely to succeed on the merits"? (2) Will it be "irreparably injured absent a stay"? (3) Will a stay substantially injure other parties? (4) Where does the public interest lie? *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). The first two conditions—likelihood of prevailing on the merits and irreparable injury—"are the most critical." *Id.* at 434. We begin with irreparable harm. *See Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam) (citation omitted).

I. The Idaho Legislature Will Suffer Irreparable Injury without a Stay.

The Legislature "will be irreparably injured" without a stay. *Nken*, 556 U.S. at 434. Supreme Court precedent teaches that "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)).

Here, the Idaho Legislature enacted Idaho Code § 18-622 (section 622) in anticipation of a decision by the Supreme Court abandoning the constitutional right to abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) is that decision. It held that "[t]he Constitution does not prohibit the citizens of each State from

regulating or prohibiting abortion," and, accordingly, "return[ed] that authority to the people and their elected representatives." *Id.* at 2284. The preliminary injunction here blocks that return of sovereign authority and thwarts Idaho's exercise of democratic self-government.

Continuing to enjoin section 622 is not harmless even if it issued months ago. Federal injunctions are the exception, not the norm. Every day that passes with an injunction in place inflicts irreparable harm on the Legislature.

Conversely, the government will not suffer irreparable harm from a stay pending appeal. Any harm from having to persuade an appellate panel that section 622 poses a genuine conflict with the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd (EMTALA) is hardly "irreparable" since the government "may yet pursue and vindicate its interests in the full course of this litigation." *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (per curiam), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017).[1]

II. The Idaho Legislature Has a Strong Likelihood of Prevailing on the Merits.

Nken requires "a strong showing" that the party requesting a stay is likely to prevail on the merits. 556 U.S. at 433. "[S]atisfaction of this factor is the irreducible minimum requirement to granting any equitable and extraordinary relief." *City and Cnty. of San Francisco v. U.S. Citizenship and Immigr. Servs.*, 944 F.3d 773, 789 (9th Cir.

[1] The government cannot cite third-party harm as the source of any supposed irreparable injury to itself. Third-party harm is an independent issue separately addressed in the third prong of the *Nken* standard. *See* 556 U.S. at 426; *accord Doe v. Trump*, 957 F.3d 1050, 1060 (9th Cir. 2020).

2019). In this motion, "we will not address the merits in detail, but only as necessary to apply the *Nken* factors." *Doe*, 957 F.3d at 1062.

A. The Preliminary Injunction Rests on an Asserted Conflict Between Federal and Idaho law.

The May Order reaffirmed the preliminary injunction issued in August 2022. *See* May Order at 11. That injunction "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 [EMTALA], 42 U.S.C. § 1395dd." August Order at 38. Hence, the injunction prohibits Idaho officials from enforcing section 622 against the following:

> [A]ny 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).

Id. at 39.

The injunction was issued in the name of federal supremacy, the Court explained. "[T]he Supremacy Clause says state law must yield to federal law when it's impossible to comply with both," and section 622 "conflicts with" EMTALA. *Id.* at 3. Section 622 is enjoined "to the extent that statute conflicts with EMTALA-mandated care." *Id.* But the injunction and its rationale harbor multiple errors.

B. EMTALA Cannot Preempt Idaho's Regulation of Medicine.

The preliminary injunction stands on the district court's chief ruling that "there will always be a conflict between EMTALA and Idaho Code § 18-622" because "EMTALA obligates the treating physician to provide stabilizing treatment, including abortion care." Aug. Order at 18, 19. While acknowledging that EMTALA contains "an express preemption provision," the court concluded that section 622 fails both impossibility and obstacle preemption. *Id.* at 19 (citing *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993)). This approach to preemption fails to account for the Ninth Circuit's instruction to "construe [EMTALA's] preemptive effect as narrowly as possible." *Draper*, 9 F.3d at 1393. It also does not apply a controlling non-preemption provision of the Medicare Act governing EMTALA.

EMTALA says that "[t]he 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. § 1359dd(f). Because the baseline is that EMTALA's provisions "do not preempt," *id.*, this is "a non-preemption provision." *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 993 (9th Cir. 2001). EMTALA has preemptive force only when state law "directly conflicts" with EMTALA's provisions. 42 U.S.C. § 1359dd(f). The adverb is to be taken seriously; an implied duty under EMTALA does not pose a direct conflict with state law. Yet the ostensible duty to provide an abortion arises not from the statutory text, but from EMTALA's generic requirement for a physician to "provide stabilizing treatment" for a patient with an emergency medical

condition." Aug. Order at 19. And an implied duty under EMTALA, if it exists at all, does not "directly" conflict with state law.

Even if one questioned this interpretation, a provision of the Medicare Act applies. There, Congress directed that "[n]othing in this subchapter [the Medicare Act] 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." 42 U.S.C. § 1395. EMTALA is bound by this provision as part of the Medicare Act. EMTALA does not authorize the federal government "to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided." *Id.*; *accord Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1258 (9th Cir. 1995) ("Congress enacted the EMTALA not to improve the overall standard of medical care, but to ensure that hospitals do not refuse essential emergency care because of a patient's inability to pay."). Enjoining Idaho law violates this prohibition.

Given all this, EMTALA cannot preempt Idaho law on the basis of a judicially implied duty to perform abortions or, at all events, preempt Idaho standards of medical care—including the conditions when an abortion is lawful. Neglecting the limits of EMTALA's preemptive reach is an error that renders the preliminary injunction void.

C. EMTALA Does Not Mandate Abortion.

The preliminary injunction rests on this Court's conclusion that "EMTALA obligates the treating physician to provide stabilizing treatment, including abortion care." Aug. Order at 19. That conclusion is also wrong.

EMTALA says nothing about abortion. Neither do the regulations issued by the U.S. Department of Health and Human Services (HHS). *See* 42 C.F.R. § 489.24. The duty of Medicare-participating hospitals to perform abortions as emergency care arises, if at all, by implication. But a close reading of EMTALA shows that Congress intended hospitals to provide emergency medical care to a pregnant woman *and* her unborn child.

EMTALA obligates a Medicare-participating hospital to (1) perform "an appropriate medical screening examination" to see whether the patient has an emergency medical condition, 42 U.S.C. § 1395dd(a); (2) conduct a further medical exam along with "such treatment as may be required to stabilize the medical condition" or send the patient "to another medical facility," *id.* § 1395dd(b)(1); and (3) transfer a patient with an emergency medical condition that has not been stabilized only as provided and where "appropriate," *id.* § 1395dd(c)(1). A pregnant woman in labor with an unstabilized emergency medical condition may be transferred only if a physician certifies that "the medical benefits reasonably expected" from medical treatment at a different medical facility "outweigh the increased risks … to the unborn child from effecting the transfer." *Id.*

These duties arise when a patient has an "emergency medical condition," as the statute defines it. 42 U.S.C. § 1395dd(e)(1); *accord* 42 C.F.R. § 489.24 (HHS regulations). Under subsection (A), a pregnant woman has an "emergency medical condition" triggering the hospital's duty of care if "the absence of immediate medical attention" could put "the health of the woman or her unborn child in serious jeopardy."

42 U.S.C. § 1395dd(e)(1)(A) (punctuation altered). Congress thus directed Medicare-participating hospitals to give emergency medical treatment to preserve the health of "an unborn child" no less than to preserve the health of the mother. *Id.* Subsection (B) prescribes the necessary emergency care for "a pregnant woman who is having contractions." 42 U.S.C. § 1395dd(e)(1). She has an emergency medical condition if a physician determines that "(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." *Id.* § 1395dd(e)(1)(B). Transferring her to another facility is forbidden unless there is time enough for "a safe transfer … *before* delivery." *Id.* § 1395dd(e)(1)(B)(i) (emphasis added). This prohibition avoids the prospect of delivering a child during an ambulance ride or in a related circumstance away from the comfort and safety of a hospital. Then there is a catchall prohibition on any transfer that "may pose a threat to the health or safety of the woman or the unborn child." *Id.* § 1395dd(e)(1)(B)(ii). Even the prospect of such a threat bars a transfer. The hospital is thus obliged to consider not only the unborn child's life, but his or her "health or safety." *Id.*; *accord* 42 C.F.R. § 489.24 (same).

EMTALA is replete with evidence of Congress's commitment to protect both a pregnant woman and her unborn child. *See* 42 U.S.C. §§ 1395dd(e)(1)(A)(i) (defining "emergency medical condition," in part as a condition that "with respect to a pregnant woman, [puts] the health of the woman or her unborn child in serious jeopardy") (parenthesis removed); 1395dd(e)(1)(B)(ii) (defining as an "emergency medical

condition" for a "pregnant woman who is having contractions" as a situation where transferring her to another facility "may pose a threat to the health or safety of the woman or the unborn child"); 1395dd(c)(1)(A)(ii) (requiring a physician, as condition of transferring a pregnant woman in labor, to determine that "the medical benefits" of transfer "outweigh the increased risks … to the unborn child from effecting the transfer"); and 1395dd(c)(2)(A) (providing that an "appropriate transfer" is one that "minimizes the risks to … the health of the unborn child"). At no point does EMTALA pit the mother's health or safety against the child's. Only the preliminary injunction (and the government's complaint) does that.

D. The Court's Orders Misconstrue EMTALA in Other Ways.

First, it is error to disregard subsection (B) of EMTALA's definition of *emergency medical condition*, 42 U.S.C. § 1395dd(e)(1), as the August Order does. *See* Aug. Order at 4 n.1. EMTALA's directions regarding the proper treatment of "a pregnant woman who is having contractions" are plainly relevant to the government's claim challenging Idaho's restrictions on the availability of abortion. 42 U.S.C. § 1395dd(e)(1).

Second, it is a fundamental error to rewrite EMTALA's definition of *emergency medical condition* by removing references to the medical treatment of an unborn child. The injunction applies whenever section 622 would interfere with an abortion considered "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)." Aug. Order at 38–39. Compare that quotation from EMTALA with the original:

> 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, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part ….

42 U.S.C. § 1395dd(e)(1)(A) (deletions added).

Altering EMTALA in this way contravenes the "well established principle of statutory construction that legislative enactments should not be construed to render their provisions mere surplusage." *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (cleaned up). Surplusage is exactly what the phrase "unborn child" becomes under the Court's rendering of EMTALA in the preliminary injunction. 42 U.S.C. § 1395dd(e)(1)(A). Removing those words is particularly objectionable in a case where the fate of such children in Idaho is at stake. Reading EMTALA as an abortion mandate is plausible only because references to the health and safety of unborn children have been erased.

Third, it is error to say that EMTALA "calls for stabilizing treatment, which of course may include abortion care." August Order at 21. The statute requires stabilizing treatment only when a patient with an emergency medical condition cannot be transferred to another facility, consistent with statutory criteria. *See* 42 U.S.C. §§

1395dd(b)(1); 1395dd(c). Even then, the definition of *stabilized* undermines the notion of requiring a hospital to perform an abortion for that purpose. After all, EMTALA provides that a pregnant woman is stabilized when "the woman has delivered (including the placenta)." *Id.* Delivering a child is the antithesis of aborting him.

In short, EMTALA requires Medicare-participating hospitals to deliver limited medical care for patients suffering from emergency medical conditions. But it distorts the statute to interpret it as an abortion mandate.

E. Idaho Code § 18-622 Does Not Conflict with EMTALA.

Abortion was a crime under Idaho law from territorial days until *Roe v. Wade*, 410 U.S. 113 (1973). *See Planned Parenthood Great Nw v. State*, __ P.3d __, 2022 WL 3335696, at *6 (Idaho Aug. 12, 2022). Section 622 restores Idaho law to its pre-*Roe* condition by classifying abortion generally as a crime.

Having said that, not all abortions are crimes under Idaho law. Recent amendments clarify that section 622 contains straightforward exceptions rather than affirmative defenses. *See* H.B. 374, 67th Leg., 1st Sess. (Idaho 2023) (eff. July 1, 2023). Section 622 now provides that an abortion to save a woman's life or (during the first trimester) to address a pregnancy from rape or incest "shall not be considered criminal abortions." Idaho Code §§ 18-622(2); 18-622(2)(b) (as amended). Section 622 should no longer "deter physicians from providing abortions in some emergency situations." August Order at 26. The May Order is silent about these amendments. But they enhance the Legislature's likelihood of prevailing on the merits since the Ninth Circuit will "apply the

law in effect at the time it renders its decision." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974). That principle holds even if "the law has been changed pending appeal." 13C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533.6 (3d ed. 2023 update).

F. Construing EMTALA as an Abortion Mandate Raises Significant Constitutional Objections.

1. Enjoining section 622 under the Supremacy Clause is error.

The Supremacy Clause does not support the implied right of action on which the government's case rests. *See* Complaint at 15–16. In another case against Idaho, the Supreme Court held that the Supremacy Clause did not support a cause of action challenging the disparity between Idaho's Medicaid reimbursement rates and the alleged 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. *Armstrong* forecloses the government from suing Idaho under the Supremacy Clause. Enjoining section 622 on that basis is error.

2. Construing EMTALA as an abortion mandate violates the Major Questions Doctrine.

The injunction also offends the major questions doctrine, which requires "Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). When the doctrine applies, "something more than a merely plausible textual basis for

the agency action is necessary." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Three times since 2021, the Supreme Court has invoked the doctrine to decide major challenges to executive power. *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); *Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485 (2021) (voiding a nationwide eviction moratorium imposed by the Centers for Disease Control).

The May Order violates the major questions doctrine by accepting a reading of EMTALA that grants the government unprecedented authority over abortion without express congressional approval. The United States boldly claims that section 622 "conflicts with federal law" whenever Idaho's ban on criminal abortion prevents a physician from acting on his or her determination "that an abortion is the necessary stabilizing treatment for a patient's emergency medical treatment." Complaint at 10. Since federal control over Idaho abortion law is a matter of "vast … political significance," *Utility Air Regulatory Group*, 573 U.S. at 324, "more than a merely plausible textual basis" must justify it. Like the CDC's eviction moratorium, the government's reading of EMTALA seizes "a breathtaking amount of authority" by purporting to supersede state abortion laws. *Ala. Assoc. of Realtors*, 141 S. Ct. at 2489. The major questions doctrine condemns that undelegated exercise of executive power.

Nor does it matter that this suit was brought by the United States. Decisions invoking the major questions doctrine "have arisen from all corners of the administrative state." *West Virginia*, 142 S. Ct. at 2608. Although the major questions doctrine does not apply to actions of the President, *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023), the complaint was brought by the United States in its own name—not by the President. There is no reason to believe that a rule to resolve the problem of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted" somehow becomes inapt when like power is exercised by the executive branch as a whole. *West Virginia*, 142 S. Ct. at 2609.

3. As construed in the May Order, EMTALA exceeds Congress's authority under the Spending Clause.

Construing EMTALA as an abortion mandate also violates the Spending Clause. *See* U.S. CONST. art. I, § 8. The Constitution places "limits on Congress's power … to secure state compliance with federal objectives." *NFIB v. Sebelius*, 567 U.S. 519, 576 (2012). 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. Retroactive conditions are also forbidden. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

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., Dkt. 17 (attachment #1) at 5. The government further insists that EMTALA imposes duties for "all patients, not just for Medicare beneficiaries." *Id.* at 19. Because section 622 governs all abortions performed in the state, the government says, Idaho 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 that view, Idaho hospitals must perform abortions whenever the government says that EMTALA demands it; noncompliance could mean the loss of Medicare funds.

Threatening to withhold all Medicare-related funding for hospitals in Idaho unless they adhere to an expansive interpretation of EMTALA exceeds the government's authority under the Spending Clause. Consider a similar dispute under the Affordable Care Act. Multiple 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 the challenged 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 Idaho hospital 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 the conditions of participating in Medicare. Imposing its abortion mandate on Idaho hospitals retroactively is another reason to find that the government is violating the Spending Clause. *Pennhurst*, 451 U.S. at 25.

4. Construing EMTALA as an abortion mandate violates the Tenth Amendment by trenching on Idaho's reserved powers.

The preliminary injunction violates the State of Idaho's reserved powers over abortion. *Dobbs* held that that authority now belongs "to the people and their elected representatives." 142 S. Ct. at 2284. Idaho thus holds the authority to regulate abortion as a matter of federal constitutional law, but the preliminary injunction thwarts the exercise of that authority. Under the Court's orders, Idaho cannot carry out Idaho Code §§ 18-622(2) and (3), insofar as they collide with EMTALA's duty to 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." Aug. Order at 15 (quoting 42 U.S.C. §§ 1395dd(e)(1)(A)(i)-(iii)). This order overrides the political, practical, and moral judgment of Idaho's elected officials—and the voters who supported them. *See* Idaho Code § 18-622.

Because the preliminary injunction lacks clear statutory authority to preempt section 622, enjoining Idaho law on that basis distorts our system of federalism. For now, *Dobbs* is the last word on the question of which level of government—federal or state—

holds the authority to regulate abortions performed in emergency rooms. If in the future Congress adopts a law plainly superseding state abortion laws, and if judicial review sustains that law as a valid exercise of the federal government's enumerated powers, then federal law could preempt state law to the extent they conflict. But until then, blocking Idaho law based on a misinterpretation of EMTALA seriously disrupts our federal system in violation of the Tenth Amendment.

III. Granting a Stay Serves the Public Interest and Aptly Balances the Equities.

Nken holds that the remaining factors—harm to the opposing party and the public interest—"merge when the Government is the opposing party." 556 U.S. at 435. These factors too weigh in favor of a stay.

The public interest is served by confining the government within its lawful bounds and "maintaining our constitutional structure" of powers divided among the three branches of the national government and between the federal government and the states. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). *See also Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (concluding that the public interest would be served by "respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest").

Here, the public interest is served by acknowledging that section 622 comes to this Court with a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). As such, Idaho's statute "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142

S. Ct. at 2284. The United States has not tried to overcome this presumption, nor could it. *Dobbs* recognizes that under our federal system, the State of Idaho is free to strike its own balance between safeguarding the health and safety of its women and the lives of its unborn children. That same interest is reflected in EMTALA's requirement to furnish emergency medical care for both a pregnant woman and her unborn child. *See* 42 U.S.C. § 1395dd(e)(1). And it is consistent with Congress's non-preemption provisions in EMTALA, 42 U.S.C. § 1395dd(f), and the Medicare Act. 42 U.S.C. § 1395.

Presumably the United States will argue that granting a stay pending appeal would harm third parties. Even if true, the possibility of harm to third parties cannot obliterate the rest of the *Nken* factors; such harm is not among the "critical" factors of irreparable harm or the likelihood of success. Also, the government's concern for women who might face physical injury unless the injunction remains unchanged ignores mitigating factors to the contrary. EMTALA requires hospitals to provide emergency care for both a pregnant mother and her unborn child. *See* 42 U.S.C. § 1395dd(e)(1). Section 622 (as amended) flatly eliminates liability when an abortion is reasonably necessary to save a woman's life. *See* Idaho Code §§ 18-622(2); 18-622(2)(b) (as amended). And the Idaho Supreme Court has clarified that section 622 does not govern ectopic and other non-viable pregnancies. *See Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1202–03 (Idaho 2023). It cannot be true that "a showing of harm to the government [or the interests it prefers] commands the conclusion that the public interest weighs entirely in favor of

whichever outcome the government seeks." *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020).

CONCLUSION

For these reasons, the Legislature respectfully requests this Court to stay its orders dated August 24, 2022 and May 4, 2023, pending disposition of an appeal by the United States Court of Appeals for the Ninth Circuit and proceedings, if any, before the Supreme Court of the United States.

Dated this 3rd day of July, 2023.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenors-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2023, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Brian David Netter DOJ-Civ Civil Division 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	☐	U.S. Mail

DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W., Ste. 12104
Washington, D.C. 20005

☐ 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

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

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile: (208) 334-2400
☒ 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
dbower@morrisbowerhaws.com

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

Attorneys for Defendant-Intervenor Idaho Legislature

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
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 STAY PRELIMINARY INJUNCTION [Dkt. 95] PENDING APPEAL**

The Speaker of the Idaho House of Representatives Mike Moyle, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Seventh Legislature respectfully move this Court for a stay of its orders dated August 24, 2022 (Dkt. 95) and May 4, 2023, pending disposition of an appeal to the United States Court of Appeals for the Ninth Circuit

and proceedings, if any, before the Supreme Court of the United States. This motion is supported by a supporting memorandum filed contemporaneously herewith.

Dated this 3rd day of July, 2023.

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenors-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2023, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Brian David Netter DOJ-Civ Civil Division 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	☐ U.S. Mail

DOJ-Civ
Civil Division, Federal Programs Branch
1100 L Street, N.W., Ste. 12104
Washington, D.C. 20005

☐ 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

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

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile: (208) 334-2400
☒ 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

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

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Form 1 *Rev. 12/01/2021*

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.

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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):

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

RAÚL R. LABRADOR
ATTORNEY GENERAL

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

BRIAN V. CHURCH, ISB #9391
Deputy Attorneys General
514 W. Jefferson, 3rd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
brian.church@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-00329-BLW **SUPPLEMENTAL BRIEF SUPPORTING STATE OF IDAHO'S MOTION FOR RECONSIDERATION [Dkt. 101]**

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Idaho Code

Idaho Code § 18-622 ..... *passim*

Rules

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After this Court entered its preliminary injunction on August 24, 2022, Dkt. 95—and after the State of Idaho filed its initial motion for reconsideration, Dkt. 101-1—the Idaho Supreme Court issued a decision holding that Idaho's general abortion ban does not violate the Idaho Constitution. *Planned Parenthood Great N.W., Haw., Alaska, Ind., Ky. v. State of Idaho,* Nos. 49615, 49817, 49899, 2023 WL 110626 (Idaho 2023); Dkt. 119-2 at 3.[1] In reaching that decision, the Idaho Supreme Court also defined the scope of Idaho Code § 18-622 in at least two ways that conflict with this Court's interpretation of that law. *First*, the Idaho Supreme Court held that Idaho Code § 18-622 "does not require *objective* certainty" nor a "medical consensus" nor "a particular level of immediacy, before the abortion can be 'necessary'" to prevent a pregnant woman's death. Dkt. 119-2 at 89-90; *cf.* Dkt. 95 at 27-29. *Second*, the Idaho Supreme Court held that ectopic and non-viable pregnancies "do not fall within [the] definition" of "abortion[s] as defined in [Title 18, Chapter 6]." Dkt. 119-2 at 88; *cf.* Dkt. 95 at 22-23.

These aspects of the Idaho Supreme Court's recent decision are binding on this Court. *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 536 (2021) (plurality opinion of Gorsuch, J., in part II-C) (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)). Yet in its preliminary injunction decision, this Court relied on its own interpretation of Idaho Code § 18-622, which is now in conflict with the Idaho Supreme Court's binding decision. Under what is now known to be the authoritative interpretation of Idaho law, this Court's preliminary injunction decision would come out differently. The affirmative defense made available to physicians in Idaho Code § 18-622 does not conflict with EMTALA because it does not require a "medically impossible" determination that a pregnant woman is certain to die without an abortion, Dkt. 95 at 29, nor does it promote "delays" or "worsened patient outcomes"

[1] Further citations will be to the slip opinion filed at Dkt. 119-2. That opinion is now final. *See* Idaho Appellate Rule 38(b); Request for Judicial Notice.

by encouraging physicians to wait to provide care until a pregnant woman is "nearer and nearer to death." *Id.* at 32. Nor does Idaho law prevent a physician from treating a woman presenting with an ectopic or non-viable pregnancy in an emergency setting, since the treatment for those medical emergencies does not meet the definition of an "abortion" under Idaho law. Dkt. 95 at 7-8, 22-23. Accordingly, in light of the Idaho Supreme Court's recent decision, there is no conflict between Idaho Code § 18-622 and EMTALA.

The State continues to believe that this Court should reconsider its preliminary injunction decision for the reasons set out in its motion for reconsideration. Dkt. 101-1. But in addition, because this Court's preliminary injunction decision depends on an interpretation of Idaho law that the Idaho Supreme Court has now rejected, this Court should grant the State's motion for reconsideration and deny the United States' motion for a preliminary injunction.

DISCUSSION

A. This Court's interpretation of the affirmative defense as being ambiguous and requiring physicians to make "inscrutable" decisions regarding "imminency of death" is simply incorrect.

This Court's understanding of the "necessary to prevent the death of the pregnant woman" affirmative defense within Idaho Code § 18-622 is no longer supportable in light of the Idaho Supreme Court's definitive interpretation of state law. This Court found fault with the affirmative defense because it thought it lacked clarity due to "ambiguous language and the complex realities of medical judgments." Dkt. 95 at 27. In this Court's view, the affirmative defense would require a physician to determine "how imminent a patient's death must [be] before an abortion is necessary"—an "inscrutable" decision. *Id.* The Court found support for its view, not in the text of the statute, but from statements offered by doctors put forward by the federal government; it believed that the affirmative defense required physicians to

"know the imminency of death" in order to rely on the defense. *Id.* at 28. The Court also concluded that the affirmative defense required physicians to make an "often 'medically impossible' determination that 'death [i]s the guaranteed outcome.'" *Id.* at 29 (citations omitted).

But the Idaho Supreme Court understood the affirmative defense differently. The affirmative defense provides wide latitude for a physician's "good faith medical judgment" on whether the abortion is "necessary to prevent the death of the pregnant woman" based on the facts known to the physician at the time. Dkt. 119-2 at 89. A physician's subjective judgment is what matters. *Id.* Indeed, the defense "does not require *objective* certainty." *Id.* It does not require "a particular level of immediacy, before the abortion can be 'necessary.'" *Id.* Instead, Idaho Code § 18-622 "uses broad language to allow for the 'clinical judgment that physicians are routinely called upon to make for proper treatment of their patients.'" *Id.* (citing *Spears v. State*, 278 So. 2d 443, 445 (Miss. 1973)). "A 'medical consensus' on what is 'necessary' to prevent the death of the woman when it comes to abortion is not required." *Id.* at 90.

Not only is there no "immediacy" requirement in the affirmative defense, there is also no "'certain percent chance' requirement that the death will occur." *Id.* In fact, the affirmative defense was written broadly; the Idaho Supreme Court rejected an argument that the defense should have more guidelines. Those would "only necessarily *limit* the subjective nature of the affirmative defense." *Id.* Plus, as the supreme court noted, the petitioners' challenge to the "necessary to prevent the death of the pregnant woman" "improperly pluck[ed] the phrase from the sentence that gives it broad meaning." *Id.* The court also noted that adding factors such as immediacy and certain percent chance of death would add objective components to a subjective defense, removing the "wide room for the physician's 'good faith medical judgment' on whether the abortion was 'necessary to prevent the death of the pregnant woman.'" *Id.* at 89, 90-91.

The Idaho Supreme Court's decision renders essential parts of this Court's preliminary injunction order unsupportable, and as a result, this Court should deny the preliminary injunction that the United States seeks.

First, this Court's interpretation of Idaho Code § 18-622 and the affirmative defense is simply no longer supportable. A doctor need not make a determination of imminency of death in order to rely upon the affirmative defense. *Contrast* Dkt. 95 at 27, 28. There need not be a certain percent chance of death either. *Contrast id.* at 28-30. Death need not be an objectively "'guaranteed outcome.'" *Contrast id.* at 29 (citation omitted). Nor is the "clinical judgment that physicians are routinely called upon to make for proper treatment of their patients" a "medically impossible" determination. *Contrast id.* (citation omitted).

The affirmative defense has a core of circumstances "that a person of ordinary intelligence could unquestionably understand when it comes to whether his or her conduct satisfies the [] affirmative defense." Dkt. 119-2 at 90. It "includes every situation where, in the physician's good faith medical judgment, an abortion was 'necessary' to prevent the death of the pregnant woman." *Id.* (citation omitted). Contrary to this Court's understanding, the defense is not ambiguous, its required decision is not "uncertain," and it certainly is not an "empty promise." Dkt. 95 at 29.

Second, this Court's analysis of obstacle preemption regarding the affirmative defense, Dkt. 95 at 26-31, has been upended.[2] The Court built its analysis upon "[t]he uncertain scope" of the defense which led the Court to conclude the law would deter abortions. *Id.* at 27. It began by examining what a physician would need to prove to rely on the affirmative defense. *Id.* After providing an example based upon its

[2] As the State also noted in its motion for reconsideration, the Court's obstacle analysis got off on the wrong footing by assigning a different purpose to EMTALA than its recognized anti-patient-dumping purpose. Dkt. 101-1 at 11-13. Idaho's regulation of abortion certainly does not encourage the dumping of patients. Instead, Idaho encourages the protection of prenatal life.

interpretation of the defense, the Court went on to cite the federal government's physician's statements. *Id.* at 28-29. The Court cited statements from Drs. Cooper and Corrigan that were based upon imminency of death, and Dr. Corrigan who discussed predicting with certainty an outcome. *Id.* Dr. Fleisher's statement cited by the Court saw the necessary-to-prevent-the-death standard as not useful, even though the Idaho Supreme Court found it to be an act of routine clinical judgment. *Id.* at 29 (also citing Dr. Seyb's declaration).

Likewise, later statements cited by the Court from Dr. Corrigan, an amicus brief, and Dr. Fleisher, contending that the statute required a medically impossible decision that death was the guaranteed outcome, and that death must be a certainty, have been proven incorrect by the Idaho Supreme Court's interpretation of Idaho Code § 18-622. Drs. Cooper, Corrigan, and Fleisher, all had incorrect understandings of the law, and these misunderstandings certainly colored other statements made by them. *E.g.*, Dkt. 86-3 (Dr. Corrigan Suppl. Decl.) ¶ 10 (understanding Idaho law to require risk-based-percentage analysis), Dkt. 86-5 (Dr. Cooper Suppl. Decl.) ¶ 2 (understanding Idaho law to require death be "imminent"), Dkt. 86-2 (Dr. Fleisher Suppl. Decl.) ¶ 4 (understanding Idaho law to require "a certainty (or at least very high probability) of death"); *see also* Dkt. 86-4 (Dr. Huntsberger Decl.) ¶ 12 ("If we must wait until a patient's death is imminent . . . ."), Dkt. 17-8 (Dr. Seyb Decl.) ¶ 13.

Third, this Court's remaining obstacle preemption analysis, Dkt. 95 at 31-35, was based upon the supposition that providers would *delay* providing an abortion until death was imminent or more certain to occur—what the Court referred to as "the blurry line" of the defense. *Id.* at 32. Yet, the Idaho Supreme Court's interpretation of Idaho Code § 18-622 and the "necessary to prevent the death" phrase undermines this analysis and the basis for the statements provided by the federal government's doctors. Idaho's law does not require pregnant women "get nearer and nearer to death." *Id.* Instead, Idaho's law "leaves wide room for the physician's 'good

faith medical judgment,'" relies on routine clinical judgment, and provides that "'core of circumstances' that a person of ordinary intelligence could unquestionably understand when it comes to whether his or her conduct satisfies the above affirmative defense requirement." Dkt. 119-2 at 89, 90. Here, the Court's analysis of "delays" and "worsened patient outcomes" was based upon a misunderstanding of the affirmative defense in Idaho Code § 18-622. Dkt. 95 at 33. Moreover, the Court's speculative concern that it would be more difficult to recruit OB/GYNs was also based on a misinterpretation of the law, which as now interpreted by the Idaho Supreme Court, alleviates the concerns of the Court. *Id.* at 34.

Fourth, this Court's impossibility preemption analysis, Dkt. 95 at 19-24, concluded it was impossible for a physician to comply both with EMTALA and Idaho's law. The State has already explained why this is not the case because "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." Dkt. 101-1 at 9-13. The impossibility preemption analysis also relied on an incorrect understanding of the affirmative defense, finding that "the patient's death must be imminent or certain absent an abortion." Dkt. 95 at 21. Again, this understanding is simply insupportable under the Idaho Supreme Court's interpretation discussed above. Additionally, the impossibility preemption analysis faulted the defense for having a scope that "is tremendously ambiguous" and relied on the interpretation of the defense that the Court discussed in its obstacle preemption analysis—which, as shown above, was faulty. *Id.*

In sum, the Idaho Supreme Court's analysis of Idaho Code § 18-622 and its affirmative defenses undermines this Court's interpretation of the statute, upends this Court's obstacle preemption analysis, and highlights faults in this Court's impossibility preemption analysis. For these reasons, and those identified in the initial motion for reconsideration, Dkt. 101, this Court should reconsider its

preliminary injunction order and deny the United States' motion for a preliminary injunction.

B. Termination of ectopic pregnancies and other non-viable pregnancies are not abortions.

The Idaho Supreme Court's opinion also addressed the scope of Idaho Code § 18-622, and its conclusion is contrary to this Court's. This change in the controlling law is grounds for reconsideration and reversing its decision. *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). In its opinion, the Idaho Supreme Court considered if Idaho Code § 18-622 applied and imposed criminal penalties on terminating all pregnancies. Dkt. 119-2 at 87-89. Applying a limited judicial construction, the Idaho Supreme Court determined that ectopic and non-viable pregnancies "do not fall within [the] definition" of "abortion[s] as defined in [Title 18, Chapter 6]." *Id.* at 88 (second and third alterations in original). For ectopic pregnancies, the Idaho Supreme Court found that this was "[c]onsistent with the legislature's goal of protecting prenatal fetal life at all stages of development where there is *some* chance of survival outside the womb." *Id.* As for non-viable pregnancies, the court explained in those situations "where the unborn child is no longer developing" and as such terminating those "are plainly not within the definition of 'abortion.'" *Id.*

The Idaho Supreme Court has applied a limiting judicial construction to the relevant definitions and Idaho Code § 18-622 and held that termination of ectopic pregnancies and of non-viable pregnancies are not abortions. The Idaho Supreme Court's post-preliminary-injunction holding is now binding. *See* Dkt. 121 at 4.

This Court's preliminary injunction order highlighted an ectopic pregnancy as an emergency medical condition, Dkt. 95 at 7-8, and faulted the Legislature's now-validated position that the termination of an ectopic pregnancy was not an abortion, *id.* at 22-23. This of course impacts the analysis of whether there is any conflict

between EMTALA and Idaho Code § 18-622, since a prime example from the Court is now—as a matter of law—not an abortion. (Of course, the State's position is that the regulation of abortion is not in conflict with EMTALA—state law can define the bounds of care that can be provided, while EMTALA can require hospitals to deliver treatment within those bounds. *See, e.g.*, Dkt. 101-1 at 3-6, 9-13.)

The impact extends beyond this Court's preliminary injunction order, however. The federal government relied on its example of ectopic pregnancies in its complaint and its preliminary injunction briefing. Dkt. 1 at 2, 7; Dkt. 17-1 at 2, 9, 10, 18; Dkt. 86 at 8-10, 16; *see also* Dkt. 106 at 18. Then the federal government's doctors relied on the erroneous interpretation of Idaho Code § 18-622 in providing their testimony regarding ectopic pregnancy. *E.g.*, Dkt. 17-3 (Dr. Fleisher) ¶¶ 13-14; Dkt. 86-4 (Dr. Huntsberger) ¶¶ 9-13, 16. As such, a significant basis for the federal government's concern no longer exists—though, again, the State's position is that its regulation of abortion does not conflict with EMTALA.

CONCLUSION

The Idaho Supreme Court's decision is a change in the controlling law. Its interpretation of Idaho Code § 18-622 and the affirmative defenses shows not only that the Court's interpretation of the law was wrong, but also that the analysis of preemption was flawed. Second, the Court's holding regarding ectopic pregnancies (and any other non-viable pregnancies) is now unsupported. These two reasons, which supplement those identified by the State in its earlier filed motion for reconsideration, are reasons to reconsider the preliminary injunction. Upon

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reconsideration, the federal government's preliminary injunction motion should be denied.

DATED: February 6, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: */s/ Steven L. Olsen*
STEVEN L. OLSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court 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

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

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

arice@jonesday.com

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/ Steven L. Olsen
STEVEN L. OLSEN

EXHIBIT 1

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

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

Attorneys for Defendant-Intervenor Idaho Legislature

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *59.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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

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

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

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

Attorneys for Intervenor-Defendants

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *1.

Becerra unsparingly rejected the same arguments urged here:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The major questions doctrine likewise applies here.

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

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

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

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

Conclusion

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

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

Date: February 6, 2023

Respectfully submitted,
MORRIS BOWER & HAWS PLLC

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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

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

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

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

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

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

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

Attorneys for Plaintiff United States of America

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

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

Attorneys for Defendant

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

Attorneys for Amicus Curiae American Center for Law & Justice

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

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

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

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

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

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

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

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

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

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

/s/ Daniel W. Bower
Daniel W. Bower

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

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[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

Erica Evancic

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Case Number: 1:22-cv-00329-BLW
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Document Number: 123(No document attached)

Docket Text:
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)

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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, colleen.funk@ag.idaho.gov, leslie.gottsch@ag.idaho.gov

Charlotte H Taylor ctaylor@jonesday.com

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

Clay R Smith (Terminated) crsmith73@outlook.com, colleen.funk@ag.idaho.gov

Daniel Schwei daniel.s.schwei@usdoj.gov

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

Emily Nestler emily.b.nestler@usdoj.gov

Ingrid C Batey (Terminated) 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

Maher Mahmood mmahmood@democracyforward.org, ecf@democracyforward.org

Megan Ann Larrondo (Terminated) mlarrondo@cityofboise.org, aberriochoa@cityofboise.org, smcgrath@cityofboise.org

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

Thomas Molnar Fisher tom.fisher@atg.in.gov

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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Document Number: 122(No document attached)

Docket Text:
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)

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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

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Brian David Netter brian.netter@usdoj.gov

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

Charlotte H Taylor ctaylor@jonesday.com

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

Clay R Smith (Terminated) crsmith73@outlook.com, colleen.funk@ag.idaho.gov

Daniel Schwei daniel.s.schwei@usdoj.gov

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

Emily Nestler emily.b.nestler@usdoj.gov

Ingrid C Batey (Terminated) 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

Maher Mahmood mmahmood@democracyforward.org, ecf@democracyforward.org

Megan Ann Larrondo (Terminated) mlarrondo@cityofboise.org, aberriochoa@cityofboise.org, smcgrath@cityofboise.org

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

Thomas Molnar Fisher tom.fisher@atg.in.gov

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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Supreme Court of Idaho,
Boise, October 2022 Term.

PLANNED PARENTHOOD GREAT NORTHWEST, Hawaii, Alaska, Indiana, Kentucky, on behalf of itself, its staff, physicians and patients, and Caitlin Gustafson, M.D., on behalf of herself and her patients, Petitioners,
v.
STATE of Idaho, Respondent,
and
Scott Bedke, in his official capacity as Speaker of the House of Representatives of the State of Idaho; Chuck Winder, in his official capacity as President Pro Tempore of the Idaho State Senate; and the Sixty-Sixth Idaho Legislature, Intervenors-Respondents.
Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, on behalf of itself, its staff, physicians and patients, and Caitlin Gustafson, M.D., on behalf of herself and her patients, Petitioners,
v.
State of Idaho; Brad Little, in his official capacity as Governor of the State of Idaho; Lawrence G. Wasden, in his official capacity as Attorney General of the State of Idaho; Jan M. Bennetts, in her official capacity as Ada County Prosecuting Attorney; Grant P. Loebs, in his official capacity as Twin Falls County Prosecuting Attorney; Idaho State Board of Medicine; Idaho State Board of Nursing; and Idaho State Board of Pharmacy, Respondents,
and
Scott Bedke, in his official capacity as Speaker of the House of Representatives of the State of Idaho; Chuck Winder, in his official capacity as President Pro Tempore of the Idaho State Senate; and the Sixty-Sixth Idaho Legislature, Intervenors-Respondents.

Docket. Nos. 49615, 49817, 49899
|
Opinion filed: January 5, 2023

Original proceedings before the Supreme Court of the State of Idaho.

The petitions for extraordinary writs of prohibition and declaratory relief are denied.

Attorneys and Law Firms

Wilmer Cutler Pickering Hale and Dorr, LLP, New York and Bartlett & French, LLP, Boise, Idaho, for Petitioners Planned Parenthood, et al. Alan Schoenfeld argued.

Lawrence G. Wasden, Idaho Attorney General, Boise, for Respondent State of Idaho. Megan Larrondo argued.

Monte Neil Stewart, Las Vegas, Nevada, and Morris Bower & Haws PLLC, Nampa, Idaho, for Intervenors Scott Bedke, Chuck Winder, and the Legislature. Monte Neil Stewart argued.

Opinion

BRODY, Justice.

***1** These cases primarily concern whether the Idaho Constitution protects abortion from the legislature's broad power to enact laws concerning the public's health, welfare, and safety. Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, and Caitlin Gustafson, M.D., on behalf of herself and her patients (collectively "Petitioners"), bring three petitions, each seeking a writ of prohibition and declaratory relief blocking implementation and enforcement of recently enacted laws: Idaho Code sections 18-622(2) ("Total Abortion Ban"), 18-8804 and -8805 ("6-Week Ban"), and 18-8807(1) ("Civil Liability Law"). Apart from their central claim that these laws violate an implicit fundamental right to abortion

purportedly contained in the Idaho Constitution, Petitioners also raise various facial challenges, claiming these laws offend important constitutional principles, such as equal protection, due process, the special laws provision, the separation of powers doctrine, and purported "informational privacy" protections under the Idaho Constitution. Petitioners further claim that the Idaho Human Rights Act limits the legislature's ability to regulate abortion through the Total Abortion Ban and 6-Week Ban. For the reasons discussed below, we deny Petitioners' requests for extraordinary writs of prohibition and declaratory relief.

I. BRIEF SUMMARY

The Idaho Constitution does not contain an explicit right to abortion. Nevertheless, Petitioners argue that certain provisions *implicitly* enshrine abortion as a right entitled to heightened protection from the legislature's broad power to regulate conduct. In other words, they contend abortion is a "fundamental" right. If Petitioners are correct, this would place abortion alongside other "fundamental" rights that are *expressly* granted in the Idaho Constitution, such as: the right to vote, the power of the people to propose laws and enact the same at the polls independent of the legislature (i.e., the voter initiative), and the power of the people to approve or reject at the polls any act or measure passed by the legislature (i.e., the referendum).

For the reasons discussed below, we cannot read a fundamental right to abortion into the text of the Idaho Constitution. Since Idaho attained statehood in 1890, this Court has repeatedly and steadfastly interpreted the Idaho Constitution based on the plain and ordinary meaning of its text, as intended by those who framed and adopted the provision at issue. That is our duty as the judicial branch: to sustain the rule of law—not to promote our personal policy preferences. If we were to jettison that disciplined approach, even in the face of a uniquely emotional and politically divisive policy issue, the Idaho Constitution would no longer be the voice of the people of Idaho—it would be effectively replaced by the voice of a select few sitting on this Court.

The Inalienable Rights Clause in Article I, section 1 of the Idaho Constitution, which lists the rights to life, liberty, and property, provides the textual basis for the recognition of implicit fundamental rights. Indeed, Article I, section 21, while not purporting to be a repository of implicit rights, provides that the listing of rights in the Idaho Constitution "shall not be construed to impair or deny other rights retained by the people." The Inalienable Rights Clause was framed at Idaho's constitutional convention in 1889 and ratified by the people of Idaho later that same year. Thus, for us to read a fundamental right into the Idaho Constitution, we must examine whether the alleged right is so "deeply rooted" in the traditions and history of Idaho at the time of statehood that we can fairly conclude that the framers and adopters of the Inalienable Rights Clause intended to implicitly protect that right.

***2** When we apply that test to this dispute, there simply is no support for a conclusion that a right to abortion was "deeply rooted" at the time the Inalienable Rights Clause was adopted. Nothing in the territorial laws of Idaho, the record of the 1889 constitutional convention, the surrounding common law and statutes, the surrounding publications of the times, or Idaho's medical regulations at that time show abortion was viewed as a right entitled to heightened protection from the legislature's regulatory power. To the contrary, the relevant history and traditions of Idaho show abortion was viewed as an immoral act and treated as a crime. Thus, we cannot conclude the framers and adopters of the Inalienable Rights Clause intended to implicitly protect abortion as a fundamental right.

Importantly, nothing about this decision prevents the voters of Idaho from answering the deeply moral and political question of abortion at the polls. For example, if the people of Idaho are dissatisfied with these new laws, they can elect new legislators. Additionally, the Idaho Constitution is not immutable. Indeed, a review of the session laws of this State reveals that the people of Idaho have amended the Idaho Constitution 135 times since 1889—and many of these amendments span the political spectrum. In fact, voters rejected a proposal in 1970 which would have added an explicit "right of privacy" in Article I, section 1 of the Idaho Constitution in a proposed re-write of the Constitution. 1970 Idaho Sess. Laws 739, 740. Thus, we emphasize that all we are deciding today is that the Idaho Constitution, as it currently stands, does not include a fundamental right to abortion.

This conclusion answers the central question Petitioners have raised in their petitions. Additionally, as explained below, we conclude that the Total Abortion Ban, 6-Week Ban, and Civil Liability Law each pass the familiar test for determining the constitutionality of most legislation: "rational-basis" review. Under that form of review, each of these laws is constitutional because it is rationally related to the government's legitimate interest in protecting prenatal fetal life at all stages of development, and in protecting the health and safety of the mother. Importantly, the questions of whether a law passes constitutional muster—and whether a law is good policy—are distinct. In the challenges Petitioners bring today, we can only judge

these laws—as demanded by the constitutional principle of separation of powers—based on their constitutionality, not on whether they are wise policy.

II. BACKGROUND

A. Idaho's Historical Criminalization of Abortion

Before *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), declared a federal constitutional right to abortion in 1973, abortion had been a criminal offense in Idaho for more than 100 years. Since Idaho's earliest territorial days, performing an abortion was criminally prohibited except when necessary to preserve the life of a pregnant woman.

The Idaho Territory was created on March 3, 1863, when President Abraham Lincoln signed the Congressional Act of March 3, 1863, Public Law 37-96, 12 Stat. 808. Nine months later, from December 7, 1863, through February 4, 1864, the legislative assembly for the Territory of Idaho held its first session. At its conclusion, the assembly enacted a law that made performing an abortion a crime except when a physician deemed it "necessary" to "save" the life of a pregnant woman:

> [E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years: *Provided*, That [sic] no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, *deems it necessary* to produce the miscarriage of any woman *in order to save her life*.

***3** Act of Feb. 4, 1864, ch. IV, § 42, 1863–64 Idaho Terr. Sess. Laws 443 (emphasis in original and added) (alterations added).

Roughly ten months later, at the second territorial session, the legislative assembly reenacted the same criminal prohibition:

> [E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years: *provided*, that no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, *deems it necessary* to produce the miscarriage of any woman *in order to save her life*.

Act of Dec. 23, 1864, ch. III, § 42, 1864 Idaho Terr. Sess. Laws 305 (emphasis in original and added) (alteration added).

Eleven years later, the legislative assembly for the eighth territorial session allowed the same criminal prohibition against abortion to remain in force:

> [E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years, nor more than five years: *provided*, that no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, *deems it necessary* to produce the miscarriage of any woman *in order to save her life*.

Act of Jan. 14, 1875, ch. IV, § 42, 1874–75 Idaho Terr. Sess. Laws 328 (emphasis in original and added) (alteration added).

Roughly ten years later, at the thirteenth territorial session in 1885, the assembly authorized a commission to revise, simplify, arrange, and consolidate the laws of the Idaho Territory into the Revised Statutes. *See* 1884–85 Idaho Terr. Sess. Laws 132, 132–33. Roughly two years later, at the fourteenth territorial session, the Revised Statutes of 1887 were enacted, and included the same prohibition previously enacted against performing an abortion—with a new section adding a criminal penalty against the pregnant woman and making a change in the exception from "save" to "preserve" the life of the woman:

> **Sec. 6794.** Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take, any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the Territorial prison not less than two nor more than five years.
>
> **Sec. 6795.** Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the

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> same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the Territorial prison not less than one nor more than five years.

***4** Idaho Rev. Stat. (R.S.) §§ 6794, 6795 (1887) (emphasis added).

In 1889, two years after enacting the Revised Statutes of 1887, a constitutional convention was held to formulate and propose a state constitution for Idaho as a precursor to obtaining statehood. *See* Proceedings and Debates of the Constitutional Convention of Idaho 1889 (I. W. Hart ed., 1912) (hereinafter "Proceedings and Debates"). The topic of abortion was never mentioned in the minutes of the convention, *see id*. at 1–2143, despite many delegates to the convention having served as members from prior sessions of the territorial assembly—including two of the three commissioners responsible for compiling the criminal abortion laws in the 1887 Revised Statutes. *See id*. at 7–9, 2090 (listing as delegates and framers: Sol. Hasbrouck, a member of the House of Representatives for the Second Session of the Territory of Idaho (1864); A. S. Chaney and John S. Lewis (Commissioner), members of the House of Representatives for the Fourteenth Session of the Territory of Idaho (1886–87); and Jas. (James) H. Beatty (Commissioner), Jas. (James) I. Crutcher, and A. E. Mayhew (President), members of the Council (Senate) for the Fourteenth Session of the Territory of Idaho (1886–87)).

The delegates at the convention assembled and adopted the Idaho Constitution on August 6, 1889, Proceedings and Debates 2090 (I. W. Hart ed., 1912), and three months later, it was ratified by the voters of Idaho on November 5, 1899. Eight months later, following Congressional approval on July 3, 1890, Idaho became a state. At the first legislative session following statehood, from 1890 to 1891, roughly one year after the constitutional convention, many portions of the 1887 Revised Statutes were repealed, amended, or revised—but no legislator moved to change the criminal abortion laws still in force in sections 6794 and 6795. *See* H.R. Journal Idaho, 1st Sess. 1–221 (Dec. 8, 1890, to Mar. 14, 1891); Senate Journal Idaho, 1st Sess. 1–222 (Dec. 8, 1890, to Mar. 14, 1891).

In fact, sections 6794 and 6795 of the Revised Statutes remained in effect for another eighteen years. In 1907, the legislature authorized a code commissioner to again revise, arrange, simplify, and consolidate the laws of Idaho. *See* Sec. 1, 1907 Idaho Sess. Laws 178, 178–79. Two years later, the legislature enacted the resulting Revised Code as the general laws of the state of Idaho in a two-volume set, 1909 Idaho Sess. Laws 3, and within it, sections 6794 and 6795 were recodified with minor word changes:

> **Sec. 6794.** Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take, any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than two nor more than five years.
>
> **Sec. 6795.** Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than one nor more than five years.

***5** Idaho Rev. Code (R.C.) §§ 6794, 6795 (1909) (emphasis added).

Roughly eight years later, the legislature authorized another revision and recodification of Idaho's laws. *See* 1917 Idaho Sess. Laws 241. And two years after that, in 1919, the legislature enacted the resulting Compiled Statutes as the general laws of Idaho in a four-volume set, 1919 Idaho Sess. Laws 4. Within these newly compiled laws, the criminal prohibition against abortion was recodified but remained substantially the same:

> **§ 8281. Procurement of abortion.** Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the State Prison not less than two nor more than five years.
>
> **§ 8282. Submitting to abortion.** Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than one nor more than five years.

Idaho Comp. Stat. (C.S.) §§ 8281, 8282 (1919) (emphasis added).

Twelve years later, in 1931, the legislature authorized another compilation and reorganization of the laws of Idaho. *See* 1931 Idaho Sess. Laws 415. By the next year, the compilation was complete, and one year after that, the

legislature adopted the resulting Idaho Code in a four-volume set as "the authorized compilation of the statutes and codes of the State of Idaho[.]" 1933 Idaho Sess. Laws 3. Once again, the criminal prohibition against abortion was recodified but remained substantially the same:

> **17-1810. Abortion—Procurement of.—**Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine or drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than two nor more than five years.
>
> **17-1811. Abortion—Submitting to.—**Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than one nor more than five years.

I.C. §§ 17-1810, 17-1811 (1932) (emphasis added).

Roughly fifteen years later, in 1947, the legislature authorized the "1947 Idaho Code Commission" to compile, reorganize, and publish the existing laws of Idaho into a more permanent compilation; i.e., the modern Idaho Code. 1947 Idaho Sess. Laws 541, 543. The criminal prohibition against abortion was recodified, but again, otherwise remained the same:

> ***6 18-601. Abortion—Procurement of.—**Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine or drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than two nor more than five years.
>
> **18-602. Abortion—Submitting to.—**Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than one nor more than five years.

I.C. §§ 18-601, 18-602 (1947) (emphasis added).

Idaho Code sections 18-601 and -602 remained in effect for the next twenty-five years, until 1973, when the United States Supreme Court announced a federal constitutional right to abortion in *Roe v. Wade*, based on a right of privacy implicit in the United States Constitution:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

Notably, roughly three years before *Roe* was handed down, the people of Idaho, at the general election on November 3, 1970, rejected the legislature's proposed rewrite of the Idaho Constitution. 1970 Idaho Sess. Laws 739. One of the provisions the people rejected was the proposal to *add* an express "right of privacy" to Article I, section 1 of the Idaho Constitution: "All men are by nature free and equal and have certain *inalienable rights*, among them to enjoy and defend life and liberty; to acquire, possess, and protect property; and *enjoy the right of privacy*; to have the quality of their environment preserved and enhanced; to pursue happiness and secure safety." 1970 Idaho Sess. Laws 739, 740 (emphasis added).

After *Roe* was announced in 1973, the legislature, "[w]ithout condoning or approving abortion or the liberalization of abortion laws generally," repealed sections 18-601 and -602. *See* 1973 Idaho Sess. Laws 442, 443. However, at the same time, the legislature enacted new regulations based on *Roe*, and included a trigger provision that would repeal the new statutes and implement the prior criminal prohibitions against abortion "[i]n the event that the states are again permitted to safeguard the lives of unborn infants before the twenty-fifth week of pregnancy[.]" *See* 1973 Idaho Sess. Laws 442, 448; *see also* I.C. § 18-613 (1979) (providing that sections 18-604 to -611 would be repealed, and sections 18-612 to -615 would become effective, on the occurrence of certain events).

The trigger provisions in Idaho Code sections 18-614 and -615, which embodied the prior criminal prohibitions against procuring or submitting to an abortion at any gestational age except to "preserve" the life of the woman (*see* I.C. §§ 18-601, -602, *supra*), sat dormant for the next seventeen years until both were repealed in 1990. *See* 1990 Idaho Sess. Laws 464, 464 (repealing I.C. §§ 18-613 through -615). Against this legislative backdrop comes the present dispute.

B. Idaho's Recent Criminalization of Abortion

***7** In 2020, thirty years after repealing sections 18-614 and -615, the legislature passed the Total Abortion Ban, making it a felony for anyone to perform, attempt to perform, or assist with an abortion. *See* I.C. § 18-622(2). The legislature, recognizing the constitutional impediments presented by *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), crafted the Total Abortion Ban to expressly provide that it will go into effect thirty 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 ...." I.C. § 18-622(1)(a).

The Total Abortion Ban is not a duplicate of the Idaho laws prohibiting abortion pre-*Roe*. Unlike Idaho's historical abortion laws, which provided an exception to "save" or "preserve" the life of the woman, the Total Abortion Ban makes all "abortions" a crime and includes a provision directing the appropriate professional licensing board to implement certain penalties against "any health care professional" who violates it. *See* I.C. § 18-622(2); *see also* I.C. § 18-604(1) (defining "abortion" for purposes of the Total Abortion Ban); Section VI.C.1.a, *infra* (explaining that ectopic and non-viable pregnancies do not fall within the Total Abortion Ban's definition of "abortion").

Instead, and in place of exceptions, the Total Abortion Ban allows for *legally justified abortions* through affirmative defenses to prosecution. *See* I.C. § 18-622(3). The two affirmative defenses, stated generally, are: (1) "[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"; and (2) in the case of rape or incest, prior to the abortion, the woman provided the physician with a copy of her report of rape or incest to law enforcement. *See* I.C. § 18-622(3)(a)(i)–(iii), (3)(b)(i)–(iv). The allowance of a defense based on the subjective "good faith medical judgment" of the physician, coupled with the inclusion of rape and incest defenses, actually provides physicians with greater protections than the pre-*Roe* laws. In addition, unlike the pre-*Roe* laws, the Total Abortion Ban does not subject the mother to any criminal penalties, I.C. § 18-622(5).

One year later, in 2021, the legislature passed the Fetal Heartbeat Preborn Child Protection Act ("Fetal Heartbeat Act"). *See* 2021 Idaho Sess. Laws 867, 867–69 (H.B. No. 366) (originally codified as I.C. §§ 18-8701 to -8708). The Fetal Heartbeat Act makes it a felony to perform an abortion on a woman when a fetal heartbeat is detected but *exempts* from prosecution cases involving a medical emergency, rape, or incest. *See* I.C. § 18-8704 (2021). In its original form, the Fetal Heartbeat Act also provided a private cause of action for a woman who underwent an abortion to recover damages from medical professionals who intentionally, knowingly, and recklessly violated the Act. *See* I.C. § 18-8707 (2021). Again, recognizing federal constitutional impediments to implementing the law, the Fetal Heartbeat Act expressly provides that it takes effect " ... immediately upon the issuance of the mandate in any United States appellate court case in which the appellate court upholds a restriction or ban on abortion for a preborn child because a detectable heartbeat is present on the grounds that such restriction or ban does not violate the United States constitution." *See* I.C. § 18-8706 (2021).

The next year, in 2022, the Idaho Legislature amended and re-codified the Fetal Heartbeat Act to expand the private cause of action in favor of fathers, grandparents, siblings, aunts, and uncles of the preborn child and to add statutory minimum damages of $20,000. *See* I.C. § 18-8807(1) (2022) (this is the "Civil Liability Law"). Importantly, the amended Fetal Heartbeat Act also repealed Idaho Code section 18-8706—the provision which delayed the effectiveness of the Act—and moved the "trigger language" to the section providing criminal penalties for a violation of the Act. *See* 2022 Idaho Laws Ch. 152 (S.B. No. 1309) and I.C. § 18-8805. This amendment meant the Civil Liability Law would become immediately effective (on April 22, 2022, pursuant to an emergency clause in S.B. No. 1309), but the criminal liability provisions in Idaho Code sections 18-8804 and -8805 (the "6-Week Ban") would remain dormant until "triggered."

C. Procedural Background

***8** On March 30, 2022, a week after Idaho Governor Brad Little signed S.B. No. 1309 (Fetal Heartbeat Act) into law, Petitioners filed their first Petition for Writ of Prohibition, Docket No. 49615-2022, against the State of Idaho. Petitioners challenged the Civil Liability Law as violative of the Idaho Constitution under: (1) the separation of powers doctrine by usurping the executive branch's enforcement authority and handing it to private citizens to the exclusion of executive actors; (2) the "special" law prohibition; (3) an implicit constitutional guarantee of informational privacy; (4) the due process clause based on the law's minimum statutory damages of $20,000; (5) the equal protection clause by disproportionately punishing medical providers who provide abortions compared to other medical providers; and (6) an *implicit* fundamental right to abortion within one, some, or a combination of

sections 1, 17, and 21 in Article I. Petitioners asked this Court to declare the Civil Liability Law unconstitutional and to issue a peremptory writ prohibiting its implementation.

The Court initially agreed to hear the matter on an expedited basis, but subsequently granted a motion to reconsider filed by the State and agreed to allow the parties additional time to submit briefing. As part of its Order Granting Motion to Reconsider, the Court also ordered that the implementation of S.B. No. 1309 (Civil Liability Law) be stayed to preserve the status quo as requested by the parties. Afterwards, on April 18, 2022, the Court granted a motion to intervene by Scott Bedke, in his 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 ("Intervenors"). The State and the Intervenors responded to the petition, arguing the Idaho Constitution does not contain an implicit fundamental right to abortion, and that no part of the Civil Liability Law is otherwise unconstitutional.

The State later moved to vacate the stay, disputing that it had requested the stay. The Court denied the motion and on June 1, 2020, set the Civil Liability Law case for oral argument on August 3, 2022. Approximately three weeks later, the United States Supreme Court issued its landmark decision in *Dobbs v. Jackson Women's Health Organization*, —— U.S. ——, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022). In *Dobbs*, the Supreme Court held: "The [United States] Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and [*Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)] arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives." 142 S. Ct. at 2284 (alterations added).

The *Dobbs* decision "triggered" the Total Abortion Ban, and three days after it was issued, Petitioners filed their second Petition for Writ of Prohibition, Docket No. 49615-2022. In that petition, Petitioners challenged the Total Abortion Ban under the Idaho Constitution and the Idaho Human Rights Act and asked this Court to issue a peremptory writ of prohibition barring its enforcement. Unlike the Civil Liability Law challenge, Petitioners sued (in addition to the State of Idaho) specific state officials who would be in a position to enforce the Total Abortion Ban: Brad Little, in his capacity as Governor of the State of Idaho; Lawrence G. Wasden, in his capacity as Attorney General; Jan M. Bennetts, in her capacity as Ada County Prosecuting Attorney; Grant P. Loebs, in his capacity as Twin Falls County Prosecuting Attorney; the Idaho State Board of Medicine; the Idaho State Board of Nursing; and the Idaho State Board of Pharmacy (collectively "Respondents").

Like their first petition, Petitioners contended that there are implicit constitutional rights under the Idaho Constitution to bodily autonomy, privacy, and intimate family decision making that include the right to abortion. Petitioners additionally asserted that the Total Abortion Ban violates equal protection under the Idaho Constitution, and the prohibition against discrimination in the Idaho Human Rights Act. In their initial filing, Petitioners also moved to prevent the Total Abortion Ban from taking effect during the pendency of their challenge.

***9** Six days after *Dobbs* was issued, on June 30, 2022, this Court vacated the merits argument for the Civil Liability Law and ordered the parties to brief certain procedural questions to be argued at a public hearing on August 3, 2022. Before the ordered briefing was complete, the United States Court of Appeals for the Eleventh Circuit upheld a Georgia law prohibiting abortions after a detectable human heartbeat, thus "triggering" the 6-Week Ban (I.C. §§ 18-8804, -8805). *See SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, 40 F.4th 1320, 1327 (11th Cir. 2022) (holding that *Dobbs* foreclosed the abortion providers' challenge to Georgia's fetal heartbeat act). Five days later, on July 25, 2022, Petitioners filed their third Petition for Writ of Prohibition, Docket No. 49899-2022, this time challenging the 6-Week Ban. That petition contains essentially the same arguments presented in Petitioners' challenge to the Total Abortion Ban. Before the August 3 hearing, the Court granted the Intervenors' motion to intervene and oppose the petitions challenging the Total Abortion Ban and the 6-Week Ban.

Nine days after the August 3 hearing, on August 12, 2022, this Court issued a written opinion ("August 12 Opinion"), and (1) ordered the three petitions consolidated for purposes of oral argument and opinion; (2) vacated the stay against the Civil Liability Law; (3) denied Petitioners' request for a stay against the Total Abortion Ban until the Court could reach a decision on the merits; and (4) retained the consolidated petitions instead of transferring the matters to the district court for development of a factual record under Idaho Appellate Rule 5(d). In addition, the Court set oral argument for the merits of the consolidated petitions to be held on September 29, 2022 (which was later vacated and set for October 6, 2022). Respondents and Intervenors filed briefs opposing Petitioners' second and third petitions on the merits. Respondents and Intervenors essentially argue that the Idaho Constitution does not implicitly contain a fundamental right to abortion because such a right is not part of Idaho's "ordered liberty" as it is

not "deeply ingrained" or "deeply rooted" in Idaho's history and tradition at the time the Idaho Constitution was adopted.

Of note, one day before the August 3 hearing, the United States sued the State of Idaho requesting declaratory and injunctive relief against enforcement of the Total Abortion Ban to the extent it allegedly conflicts with the Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd. *See Complaint*, *United States v. State of Idaho*, 2022 WL 3137290 (D. Idaho Aug. 2, 2022). On August 24, 2022, twelve days after this Court issued its August 12 Opinion, and one day before the Total Abortion Ban took effect, the United States District Court for the District of Idaho granted the United States' request for a preliminary injunction against enforcement of the Total Abortion Ban, I.C. § 18-622(2). *See United States v. Idaho*, No. 1:22-CV-00329-BLW, —— F.Supp.3d ——, ——, 2022 WL 3692618, at *15 (D. Idaho Aug. 24, 2022).

Specifically, the federal district court ordered that, during the pendency of the federal suit, the Total Abortion Ban cannot be enforced in a criminal prosecution, or a proceeding to suspend, revoke, or impose any form of liability on a medical provider or hospital where an abortion is necessary to avoid: (1) " 'placing the health of' " a pregnant patient 'in serious jeopardy' "; (2) " 'serious impairment to bodily functions' of the pregnant patient"; or (3) " 'serious dysfunction of any bodily organ or part' of the pregnant patient," pursuant to 42 U.S.C. § 1395dd(e)(1)(A)(i)–(iii). *Id*.

Throughout these proceedings, the State and Respondents raised a number of procedural, jurisdictional, and evidentiary matters. In response to the first petition challenging the Civil Liability Law, the State argues: (1) Petitioners have not properly invoked this Court's original jurisdiction; (2) Petitioners do not have standing and their claims are not ripe; and (3) the State of Idaho is not a proper respondent thus, it should be dismissed along with the petition. In response to the second petition challenging the Total Abortion Ban, Respondents similarly argue: (1) Petitioners have not properly invoked this Court's original jurisdiction; (2) Petitioners lack standing to sue on behalf of women; and (3) the State of Idaho is not a proper respondent and thus, it should be dismissed. In response to the third petition challenging the 6-Week Ban, Respondents include the same procedural arguments as against the second petition but add that the challenge to the 6-Week Ban is "largely moot" now that the Total Abortion Ban is in effect. Intervenors did not take a position on the jurisdictional issues, but joined, in part, with Respondents' mootness argument against the 6-Week Ban.

***10** Finally, in response to declarations from Kristine Smith and Caitlin Gustafson, M.D., filed in support of Petitioners' first and second petitions, and a similar declaration from Dr. Gustafson filed in support of the third petition, the State and Respondents filed motions to strike certain portions of each declaration as inadmissible under the Idaho Rules of Evidence. On September 13, we ordered that immediately prior to oral argument on the merits (which occurred on October 6), the State and Respondents, and Petitioners, would be allotted time to present argument on the outstanding motions to strike.

III. LEGAL STANDARD

The party challenging a statute on constitutional grounds "bears the burden" of establishing that the statute is unconstitutional "and must overcome a strong presumption of validity." *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 382, 299 P.3d 186, 189 (quoting *State v. Korn*, 148 Idaho 413, 416, 224 P.3d 480, 483 (2009)). When possible, the Court is "obligated to seek an interpretation of a statute that upholds it[s] constitutionality." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007) (quotations and citations omitted) (alteration added). The Court's power to "declare legislative action unconstitutional should be exercised only in clear cases." *Id*.

IV. MOTIONS TO STRIKE

To begin, we will address the State and Respondents' motions to strike certain statements from the declarations submitted by Petitioners in support of their petitions: (1) the Declaration of Kristine Smith, the Area Services Director of Planned Parenthood, and (2) the Declaration of Caitlin Gustafson, M.D., a physician who performs abortions. They contend the declarations contain testimony that is speculative and inadmissible under Idaho Rules of Evidence 602, 701, and 702. Petitioners respond by explaining that the declarations contain testimony necessary to provide "sufficient facts" for the Court to exercise its original jurisdiction, as was done in previous original actions before the Court. *See, e.g.*, *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021), *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020), and *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000). Petitioners further rely on their declarations to rebut the State and Respondents' argument that Petitioners

have not presented a justiciable controversy.

Idaho Rule of Evidence 602 requires that for testimony to be admissible, the witness must have personal knowledge of the matter to which they testify. Next, Idaho Rule of Evidence 701 provides the standard for when a lay witness may testify in the form of an opinion or inference:

> If a witness is not testifying as an expert, testimony in the form of an opinion or inference is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

If a witness is testifying as an expert, Idaho Rule of Evidence 702 provides the following requirements to admit their opinion testimony:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

When it comes to the declarations of Kristine Smith, the State and Respondents challenge a multitude of statements made by Smith relating to, and opining on, medical terms, national poverty statistics, "barriers" for women seeking abortion care, how Idaho's abortion laws impact Idaho women, the safety of abortion procedures, the reasons a woman might seek an abortion, that medical staff are in danger of losing their "livelihoods and their liberty," Idaho's healthcare system, Idaho's social services, and the experience of Texas residents related to abortions. The State and Respondents argue that Smith is not qualified to opine on these medical, sociological, psychiatric, and economic issues as a lay person who only performs managerial duties as an Area Services Director of Planned Parenthood. We agree. Smith's testimony here is inadmissible under Rule 602 for lack of foundation and personal knowledge, and under Rule 702, because Smith has not been shown to be a qualified expert with the knowledge, skill, experience, training, or education to offer an opinion in these areas. To the extent Smith's declarations in the Civil Liability Law and Total Abortion Ban cases contain such statements or opinions, the motions to strike are granted.

***11** However, to the extent the State and Respondents moved to strike paragraphs in Smith's declarations that testify to Smith's personal knowledge of the operational aspects of Planned Parenthood, its services, and its general client data, the motions are denied. As the Area Services Director of Planned Parenthood, Smith has personal knowledge to testify to those facts; thus, those statements are admissible under Rule 602. Finally, to the extent that any of Smith's declarations contain statements that could arguably be read as legal conclusions, this Court will disregard such statements as a matter of course.

Regarding the declarations of Dr. Gustafson submitted in support of the petitions in the Civil Liability Law, Total Abortion Ban, and 6-Week Ban cases, the State and Respondents move to strike several paragraphs as speculative and beyond Dr. Gustafson's personal knowledge. In particular, the State and Respondents challenge opinions made by Dr. Gustafson regarding the experience or circumstances of women in Idaho, the reasons women in Idaho might seek an abortion, sociological impacts on women, that other providers will be prevented from providing abortions, logistical issues that women seeking an abortion could face, and that the challenged laws deny access to safe medical care. We deny the motions to strike.

The "test for determining whether a witness is qualified as an expert is not rigid" but "practical experience or special knowledge must be shown to bring a witness within the category of an expert." *Reclaim Idaho*, 169 Idaho at 417, 497 P.3d at 171 (cleaned up) (quoting *Phillips v. E. Idaho Health Services., Inc.*, 166 Idaho 731, 755, 463 P.3d 365, 389 (2020). Here, Dr. Gustafson has adequately demonstrated her qualifications, experience, and expertise to offer expert opinions under Rule 702. Contrary to the State and Respondent's position, the opinions in Dr. Gustafson's declarations that touch on the above matters are not speculative because each provides an opinion upon which an expert in the field can properly opine. *See Reclaim Idaho*, 169 Idaho at 417, 497 P.3d at 171. Any objections to Dr. Gustafson's methodology in reaching her opinions go to the weight, not the admissibility, of her testimony. Therefore, the State and Respondent's motions to strike paragraphs in Dr. Gustafson's declarations are denied.

V. JURISDICTION, PROCEDURE, AND JUSTICIABILITY

A. Original Jurisdiction

Before addressing the merits of Petitioners' challenges, we must determine whether Petitioners have properly invoked this Court's original jurisdiction. In *Reclaim Idaho v. Denney*, a recent case where we interpreted the people's initiative and referendum powers under the Idaho Constitution, we reiterated the legal basis for exercising original jurisdiction:

> Article V, Section 9 of the Idaho Constitution vests this Court with original jurisdiction to issue writs of mandamus and prohibition, as well as 'all writs necessary or proper to the complete exercise of its appellate jurisdiction.' This original jurisdiction is limited only by the separation of powers provisions contained in Article II, Section 1 of the Idaho Constitution and this Court's own rules. *Mead v. Arnell*, 117 Idaho 660, 663, 791 P.2d 410, 413 (1990). 'Any person may apply to the Supreme Court for the issuance of any extraordinary writ or other proceeding over which the Supreme Court has original jurisdiction.' I.A.R. 5(a). The procedural guidelines over special writs are outlined in Idaho Appellate Rule 5. Once this Court asserts its original jurisdiction, 'it may issue writs of mandamus and/or prohibition.' *Mead*, 117 Idaho at 663–64, 791 P.2d at 413–14.

***12** 169 Idaho 406, 418, 497 P.3d 160, 172 (2021) (quoting *Ybarra v. Legislature by Bedke*, 166 Idaho 902, 906, 466 P.3d 421, 425 (2020)).

In *Reclaim,* we explained that "we have accepted original jurisdiction in matters where 'the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature[.]' " 169 Idaho at 418, 497 P.3d at 172 (alteration added) (quoting *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990)); *see, e.g.*, *Regan v. Denney*, 165 Idaho 15, 19, 437 P.3d 15, 19 (2019) (concluding that the challenge to Idaho Code section 56-267 as violative of Article III, section 1 was "of an urgent nature" due to the time requirement in that statute).

Here, based on the declarations submitted by Petitioners and the sea-change in abortion jurisprudence caused by *Dobbs*, we recognize the urgent and immediate need to answer the constitutional violations alleged against the Civil Liability Law, the Total Abortion Ban, and the 6-Week Ban. Before *Dobbs* disclaimed any fundamental right to abortion under the federal constitution on June 24, 2022, Idaho abortion law had been under the purview of the United States Supreme Court's decision in *Roe* and its ensuing progeny since 1973. Therefore, there can be no serious dispute that the Petitioners' challenge to the Civil Liability Law (S.B. No. 1309), which was drafted pre-*Dobbs* and seriously affected the then-existing federal constitutional right to abortion, presented a possible constitutional violation of an urgent nature to properly invoke this Court's original jurisdiction.

After *Dobbs* was issued, the previously dormant Total Abortion Ban was triggered and later went into effect on August 25, 2022. Roughly one week before the Total Abortion Ban took effect, the 6-Week Ban took effect on August 19, 2022. The Total Abortion Ban is still in effect to the extent it does not conflict with EMTALA, and where it does conflict, the 6-Week Ban is no longer "superseded" and is in effect. Notably, the 6-Week Ban and Civil Liability Law have a "medical emergency" exemption, *see* Section VI.C.2.a., *infra*, which appears to apply in nearly identical circumstances in which EMTALA might preclude the Total Abortion Ban from being enforced.

Nevertheless, in the short time since *Dobbs*, there has been a serious shift in the laws concerning how abortions are treated in Idaho. This shift in the constitutional landscape, paired with Petitioners' supporting declarations explaining how this shift affects them and the people they serve, warrants our conclusion that Petitioners have alleged potential constitutional violations of an urgent nature in challenging the Civil Liability Law, the Total Abortion Ban, and 6-Week Ban. For these reasons, we will exercise our original jurisdiction over these consolidated petitions.

B. The State of Idaho is a proper respondent.

Next, we reject the State's and Respondents' contention that the State of Idaho cannot be named as a respondent in these consolidated petitions. It is neither procedurally improper nor unusual to name the State of Idaho as a party in a case seeking declaratory relief when a constitutional violation is alleged. *See Idaho Sch. for Equal Educ. Opportunity v. State*, 142 Idaho 450, 453, 129 P.3d 1199, 1202 (2005); *see also Tucker v. State*, 162 Idaho 11, 18, 394 P.3d 54, 61 (2017) ("[S]overeign immunity is inapplicable when constitutional violations are alleged."). Under Idaho Rule of Civil Procedure 74(a)(2), the Court has authority to enjoin unconstitutional conduct by issuing a writ of prohibition against a "person" acting on behalf of the State of Idaho to enforce or implement the 6-Week Ban or Total Abortion Ban. This necessarily means that when the State of Idaho is named as a respondent, the relief may issue against those persons the State is comprised of (i.e., all its officers, employees, and agents). Furthermore, any practical doubts as to whether the State of Idaho could be named in the challenge to the Civil Liability Law were dispelled after the recent decision in *SisterSong* triggered the criminal liability provision (the 6-Week Ban) in the Fetal Heartbeat Act. Accordingly, we deny the motions to

dismiss the State of Idaho from these consolidated petitions.

C. Justiciability

***13** Finally, before we reach the merits, we must address the justiciability of Petitioners' challenges to the Civil Liability Law, the Total Abortion Ban, and the 6-Week Ban. Related to the Civil Liability Law, the State argues that the Petitioners do not have standing and their claims are not ripe. Related to the Total Abortion Ban, the Respondents similarly argue that the Petitioners do not have standing to sue on behalf of women. Related to the 6-Week Ban, the Respondents point to the same procedural deficiencies, but add that the challenge against the 6-Week Ban is "largely moot" because the Total Abortion Ban is in effect. Intervenors join in the mootness question to argue that whether the trigger provision in the 6-Week Ban is unconstitutionally vague is moot as of the August 12 Opinion.

"A party must present a justiciable controversy in order to invoke the original jurisdiction of this Court and seek declaratory relief." *Reclaim Idaho*, 169 Idaho at 418, 497 P.3d at 172. "A prerequisite to a declaratory judgment action is an actual or justiciable controversy." *Id.* (quoting *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989)). Questions of justiciability typically center on standing, ripeness, and mootness. *Id.* For the reasons explained below, we conclude that Petitioners' challenges against the Civil Liability Law, the Total Abortion Ban, and the 6-Week Ban are justiciable.

1. Ripeness

The State's argument that Petitioners' claims against the Civil Liability Law are not ripe is meritless. "[R]ipeness asks 'whether there is any need for court action at the present time.' " *State v. Philip Morris, Inc.*, 158 Idaho 874, 883 n.6, 354 P.3d 187, 196 n.6 (2015) (quoting *Miles*, 116 Idaho at 642, 778 P.2d at 764). If a controversy has not "actually arisen, and it is shown that a controversy might never arise, the case is not ripe for judicial review." *Philip Morris, Inc.*, 158 Idaho at 883 n.6, 354 P.3d at 196 n.6. Here, as explained under the original jurisdiction question, *supra*, there is an immediate and palpable controversy post-*Dobbs* over whether the Civil Liability Law violates the Idaho Constitution. Thus, Petitioners' challenge is ripe for judicial review.

2. Standing

"It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). Although the Idaho Constitution does not contain a "case or controversy" clause like the United States Constitution, we have, to avoid advisory opinions, nevertheless adopted this self-imposed constraint from federal practice:

> To establish standing a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. An injury sufficient to satisfy the requirement of an injury in fact must be concrete and particularized and actual or imminent, not conjectural or hypothetical.

Coeur D'Alene Tribe v. Denney, 161 Idaho 508, 513, 387 P.3d 761, 766 (2015) (cleaned up) (quoting *Philip Morris, Inc.*, 158 Idaho at 881, 354 P.3d at 194).

"[S]tanding 'requires a *showing* of a 'distinct palpable injury' and 'fairly traceable causal connection between the claimed injury and the challenged conduct.' " *Philip Morris, Inc.*, 158 Idaho at 881, 354 P.3d at 194 (emphasis in original) (quoting *Young*, 137 Idaho at 104, 44 P.3d at 1159). The "bar for standing can vary with the circumstances of each individual case[,]" and "is admittedly 'imprecise and difficult to apply.' " *Reclaim Idaho*, 169 Idaho at 419, 497 P.3d at 173 (quoting *Young*, 137 Idaho at 104, 44 P.3d at 1159).

As to the Civil Liability Law challenge, the only issue in dispute is whether Petitioners have met the injury-in-fact requirement. In a pre-enforcement challenge to governmental action, the injury-in-fact requirement is satisfied when the challenger alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). Here, in support of its challenge, Petitioners submitted declarations alleging they *only* ceased performing abortions because of the "severe consequences on medical practitioners like Petitioners[.]" Petitioners allege the "risk of ruinous and uncertain financial liability" from violating the Civil Liability Law gives them no choice but to cease all abortion services. Moreover, because the

law appears to be aimed at enforcing a legislatively sponsored abortion ban through private actors instead of governmental actors, *see* I.C. § 18-8807(6)–(7), it is essentially a governmental ban against conduct Petitioners allege the Idaho Constitution protects. Accordingly, we conclude Petitioners have made a sufficient showing to meet the injury-in-fact requirement.

***14** As to the Total Abortion Ban and 6-Week Ban challenges, Respondents argue that Petitioners do not have third-party standing to sue on behalf of Idaho women and assert their legal interests. This Court, as illustrated in *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010), is hesitant to hear cases where the rights asserted are not those of parties to the litigation. As noted in *Doe*, "this requirement is based on the presumption that the third parties themselves are the best proponents of their own rights." *Id.* (quoting *Singleton v. Wulff*, 428 U.S. 106, 113–14, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)). However, we agree with the United States Supreme Court that there are certain times when a third-party litigant is able to advocate for particular rights. *Id.*; *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). As a result, both the Idaho and the U.S. Supreme Court require a litigant who seeks to assert the rights of another party to demonstrate three interrelated criteria: (1) the litigant suffered injury in fact, providing a significantly concrete interest in the outcome of the matter in dispute; (2) a sufficiently close relationship to the party whose rights are being asserted; and (3) a bar to the third parties' ability to protect their interests. *Doe*, 148 Idaho at 936, 231 P.3d at 1033 (citing *Powers*, 499 U.S. at 411, 111 S.Ct. 1364).

As discussed above, Petitioners have demonstrated an injury in fact with a significantly concrete interest in the outcome of the matter of this dispute. Based on the severe consequences of performing abortions after the enactment of these laws, the potential financial liabilities, and the governmental control on an allegedly constitutionally protected activity, Petitioners have met the first criteria for third-party standing.

Next, the doctor-patient relationship has long been held to be a sufficiently close relationship to meet the requirements for third-party standing in the abortion context. *See Kootenai Med. Ctr. ex rel. Teresa K. v. Idaho Dep't of Health & Welfare*, 147 Idaho 872, 879, 216 P.3d 630, 637 (2009); *Singleton*, 428 U.S. at 117, 96 S.Ct. 2868; *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Respondents argue that by overturning abortion's federal constitutional protection, *Dobbs* means this Court cannot rely on the standing principles defined in *Roe* or its progeny. *See Dobbs*, 142 S. Ct. at 2275 (citing other abortion cases as "ignor[ing] the Court's third-party standing doctrine.") (alteration added). However, *Dobbs* held that "the Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion" and that *Roe* and *Casey*'s improper arrogation of that regulatory authority to the United States Supreme Court was overturned. *Id.* at 2284. The *Dobbs* decision did not, however, abrogate the basic third-party standing principle that "[a]side from the woman herself ... the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision [to get an abortion]." *Singleton*, 428 U.S. 106 at 117, 96 S.Ct. 2868. As such, Petitioners have demonstrated a sufficiently close relationship for third-party standing.

With respect to the third criteria, Respondents argue that because women have the ability to bring a privacy or equal protection based claim using a pseudonym, there is not a sufficient bar to establish third-party standing. However, the use of a pseudonym does not obviate the other obstacles women face in bringing this type of challenge. *See Singleton*, 428 U.S. at 117–118, 96 S.Ct. 2868 (explaining that while the obstacles a woman faces in bringing one of these suits are not insurmountable, they are sufficient for a physician to establish third-party standing); *Kootenai Med. Ctr. ex rel. Teresa K. v. Idaho Dep't of Health & Welfare*, 147 Idaho 872, 879, 216 P.3d 630, 637 (2009) (noting that some of the "obstacles" mentioned in *Singleton* included privacy concerns and "the inherent time limitation in which a woman may obtain an abortion"). Between the privacy concerns of the women of Idaho, and the potential stigmatization connected to these situations in a post-*Dobbs* world, Petitioners have demonstrated a sufficient bar to the third parties' ability to protect their own interests.

3. Mootness

***15** Finally, we address the mootness challenge against the 6-Week Ban. "An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief." *State v. Barclay*, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (quotations omitted). However, we recognize three exceptions to the mootness doctrine: "(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest." *Koch v. Canyon Cnty.*, 145 Idaho 158, 163, 177 P.3d 372, 377 (2008) (quoting *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 851, 119 P.3d 624, 626 (2005)).

Here, our conclusion below upholding the Total Abortion Ban might, in normal circumstances, warrant dismissal of the petition against the 6-Week Ban as moot because the Total Abortion Ban "supersede[s]" the 6-Week Ban. *See* I.C. § 18-8805(4). Thus, we would not need to reach the constitutionality of the 6-Week Ban. However, the circumstances of these consolidated petitions are far from normal. As explained above, a preliminary injunction was issued on August 24, 2022, against enforcement of the Total Abortion Ban where it allegedly conflicts with EMTALA. *See United States v. Idaho*, No. 1:22-CV-00329-BLW, —— F.Supp.3d ——, ——, 2022 WL 3692618, at *15 (D. Idaho Aug. 24, 2022). Because we cannot know how or when this pending federal case will resolve, and there are concerns of "substantial public interest" at stake, we conclude that Petitioners' constitutional challenges against the 6-Week Ban are still ripe.

Petitioners' only other mootness challenge is the one pointed out by Intervenors relating to the 6-Week Ban's trigger date. Petitioners' initial briefing argues the trigger date for when the 6-Week Ban takes effect is "unconstitutionally vague" because "a person of ordinary intelligence" is "unable to determine when the statute in fact takes effect." However, as explained above, the trigger date for the 6-Week Ban was August 19, 2022. Thus, we conclude Petitioners' challenge to the trigger date for the 6-Week Ban is moot.

VI. CONSTITUTIONAL ISSUES

A. The Idaho Constitution does not contain an implicit fundamental right to abortion.

Petitioners' facial challenges under the Idaho Constitution to the Civil Liability Law, the Total Abortion Ban, and the 6-Week Ban have one theme in common: each is predicated on the theory that one, some, or a combination of various sections within Article I of the Idaho Constitution implicitly guarantee a fundamental right to abortion. If Petitioners are correct, laws passed by the legislature that regulate the exercise of this right would be presumptively unconstitutional unless they are narrowly tailored to serve a compelling governmental interest. *See Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000). If Petitioners are incorrect, laws regulating or prohibiting abortion are presumptively constitutional like any other law related to health, safety, welfare, or morals, *see Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd.*, 168 Idaho 308, 313, 483 P.3d 365, 370 (2021), and will only be deemed unconstitutional when they are not rationally related to a legitimate governmental purpose, *Nelson v. Pocatello*, 170 Idaho 160, ——, 508 P.3d 1234, 1244 (2022).

It is undisputed that the Idaho Constitution does not contain an express right to abortion. *See* Idaho Const. Art. I–XXI. Nevertheless, Petitioners maintain that Article I *implicitly* protects overarching rights to "privacy," "bodily autonomy," and "intimate familial decisions," and that within one of these rights, sits the right they argue for: a fundamental right to abortion. Petitioners contend that some combination of sections 1, 17, and 21 in Article I are the appropriate textual root(s) for finding an implicit fundamental right to abortion. In other words, instead of directly arguing that a particular section or combination of sections in Article I implicitly contains the "right to abortion," Petitioners seek the recognition of a fundamental right based on three other alleged rights that *also* do not exist in the plain text of the Idaho Constitution—i.e., the rights of "privacy," "bodily autonomy," and "intimate familial decisions." *See* Idaho Const. Art. I–XXI.

***16** However, we need not wade through the inferential leaps Petitioners present to answer their central question. Regardless of whether the overarching rights to "privacy," "bodily autonomy," and "intimate familial decisions" exist—there is nothing to indicate that the particular "right of abortion" is part of any of those rights. This is because a "right to abortion" has no support in Idaho's deeply rooted traditions or history at the time Article I, sections 1, 17, and 21 were framed and adopted. Thus, we cannot conclude the Idaho Constitution, as written and intended, implicitly guarantees a fundamental right to abortion. If it is the will of the electorate, the Idaho Constitution can certainly be amended to add a right to abortion, or the people can elect legislators willing to pass laws legalizing abortion. *See* Idaho Const. Art. XX, §§ 1–4 (explaining the amendment process). In the 134 years since the Idaho Constitution was ratified, the people of Idaho have successfully amended it 135 times. Nonetheless, "[t]he [Idaho Supreme C]ourt did not make, nor can it change, the provisions of the [C]onstitution." *Cohn v. Kingsley*, 5 Idaho 416, 439, 49 P. 985, 993 (1897) (Houston, J., on denying rehearing) (alterations added).

1. The plain and ordinary meaning of the Idaho Constitution, as intended by its framers, controls our method of constitutional interpretation.

Passing on the constitutionality of statutory enactments is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 2 L.Ed. 60 (1803). *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993); *see also Miles v. Idaho Power Co.*, 116 Idaho 635, 640, 778 P.2d 757, 763 (1989). When we are called on to perform this duty under the Idaho Constitution, "the primary object is to determine the intent of the framers." *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019) (quoting *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006)). "This Court has long taken this approach to interpreting our state constitution." *Clarke*, 165 Idaho at 397, 446 P.3d at 455.

Indeed, we have taken this approach since 1891, two years after the Idaho Constitution was ratified, to as recently as January 2022, roughly three months before Petitioners first averred that the Idaho Constitution implicitly guarantees a fundamental right to abortion. *See, e.g.*, *People v. George*, 2 Idaho 813, 26 P. 983, 983 (1891) (interpreting Article XVII, section 3 through the "design of its framers" to hold a statute dividing counties unconstitutional); *Cohn v. Kingsley*, 5 Idaho 416, 422, 49 P. 985, 988 (1897) (interpreting Article III, section 15 through the "intention of the framers" to hold a legislative act "void" for not complying with enactment requirements); *Wilson v. Perrault*, 6 Idaho 178, 180, 54 P. 617, 618 (1898) (interpreting Article XV, section 6 through the "framers" intent where it requires the legislature to provide by law the manner in which reasonable maximum rates may be set for "use of water sold, rented or distributed"); *Christensen v. Hollingsworth*, 6 Idaho 87, 93, 53 P. 211, 212 (1898) (interpreting Article I, section 7 and Article V, section 1 "in the light of the law existing at the time of the adoption of the constitution" to hold the defendants were not entitled to a jury trial in an action to reform and foreclose a mortgage); *Toncray v. Budge*, 14 Idaho 621, 647-49, 95 P. 26, 37–38 (1908) (interpreting the terms "celestial" and "patriarchal" marriage, formerly in Article VI, section 3, as "meant and intended" by the "framers of the Constitution, and the people in its adoption," to prohibit those practicing "bigamous" or "polygamous" marriages from voting, serving as a juror, or holding civil office); *Grice v. Clearwater Timber Co.*, 20 Idaho 70, 76, 117 P. 112, 113–14 (1911) (interpreting Article III, section 19 through the "minds of the framers" to hold the term "highways" was not "intended" to include navigable rivers); *Fralick v. Guyer*, 36 Idaho 648, 653, 213 P. 337, 338 (1923) (interpreting Article XI, section 17 by looking to what the "members of that convention intended when they wrote" that section into the Idaho Constitution); *Williams v. Baldridge*, 48 Idaho 618, 626-29, 284 P. 203, 206–07 (1930) (interpreting the legislature's authority to provide tax exemptions under Article VII, section 5 by looking at what the founders "intended" as "borne out" by the "Constitutional Debates"); *Oregon Short Line R. Co. v. Pfost*, 53 Idaho 559, 567-68, 27 P.2d 877, 880–81 (1933) (interpreting Article XI, section 5 by looking to the "framers" intent behind the phrase "[a]ll railroads shall be public highways" (alteration added)); *Girard v. Diefendorf*, 54 Idaho 467, 478, 34 P.2d 48, 50–52 (1934) (interpreting Article IX, section 11 based on the meaning "within the intent of the framers" at the time an amendment to that section was adopted); *Idaho Mut. Ben. Ass'n v. Robison*, 65 Idaho 793, 800–01, 154 P.2d 156, 159–60 (1944) (interpreting the amendment to Article V, section 9 authorizing direct appeal from orders of the Industrial Accident Board to the Supreme Court by examining the intent of the people who ratified it); *Higer v. Hansen*, 67 Idaho 45, 53–65, 170 P.2d 411, 415–425 (1946) (interpreting Article V, sections 17 and 27, and Article IV, section 19 through the framers' intent by examining the debates during the 1889 constitutional convention); *Thompson v. Engelking*, 96 Idaho 793, 805–07, 537 P.2d 635, 647–49 (1975) (interpreting Article IX, section 1 through the "history of our constitutional convention" to hold that the Idaho Constitution does not guarantee a "fundamental right to completely equal educational expenditures" per student); *Sweeney v. Otter*, 119 Idaho 135, 142, 804 P.2d 308, 315 (1990) (interpreting Article IV, section 13 by looking to "evidence of the intent of the framers"); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999) (interpreting Article I, section 7 as securing the jury trial right "as it existed at common law when the Idaho Constitution was adopted"); *Nate v. Denney*, 166 Idaho 801, 810, 464 P.3d 287, 296 (2017) (interpreting the meaning of Article IV, section 10 as "fixed when it [was] adopted" (alteration added)); *State v. Clarke*, 165 Idaho 393, 399, 446 P.3d 451, 457 (2019) ("[W]e conclude that the framers of the Idaho Constitution understood that Article I, section 17 prohibited warrantless arrests for completed misdemeanors." (alteration added)); *State v. Winkler*, 167 Idaho 527, 531, 473 P.3d 796, 800 (2020) (interpreting the term "pardon" in Article IV, section 7 through the "intent of the drafters" by looking to "sources close in time to the adoption of Idaho's constitution"); *Reclaim Idaho v. Denney*, 169 Idaho at 427–230, 497 P.3d at 181–84 (interpreting the initiative and referendum powers added to Article III, section 1 based on what the "drafters of the amendment intended"); *Durst v. Idaho Comm'n for Reapportionment*, 169 Idaho 863, 870–71, 505 P.3d 324, 331–32 (2022) (interpreting Article III, section 5 through the eyes of what the "drafters of this provision and Idaho's citizens intended").

***17** And we have consistently taken this approach since 1891 for good reason. As explained by Judge Cooley, the

author of the leading state constitutional treatise relied on by the framers during the 1889 constitutional convention, *see* Proceedings and Debates 1597, 1598, 1611, 1721, 1732, 1734, 1736, 1738 (I. W. Hart ed., 1912), the Idaho Constitution is an instrument whose meaning is fixed at its creation—wholly unlike the nature of rules established at common law which may undergo "steady and imperceptible change":

> A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. *A principal share of the benefit expected from written constitutions would be lost if the rules they establish were so flexible as to bend to circumstances or be modified by public opinion.* It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. [....] What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. *The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.*

Girard v. Diefendorf, 54 Idaho 467, 474, 34 P.2d 48, 50 (1934) (emphasis added) (quoting Cooley's Constitutional Limitations (8th ed.) at 124); *see also Cohn*, 5 Idaho at 435, 49 P. at 991–92 (Houston, J., on denying rehearing) (quoting the same from an earlier edition); *Nate v. Denney*, 166 Idaho 801, 810, 464 P.3d 287, 296 (2017) (quoting the same in part).

Indeed, if this Court interpreted the Idaho Constitution through the lens of turbulent moral, political, or social changes that often occur in the time spanning a provision's adoption, this Court would be unconstitutionally amending the Constitution and usurping "a power which belongs to, and can only be exercised by, the people in their sovereign capacity." *Cohn*, 5 Idaho at 439, 49 P. at 993 (Huston, J., on denying rehearing). "[F]or this [C]ourt to do other than to adhere strictly to the provision[s] of the Constitution would be an act of judicial lawlessness." *Fluharty v. Bd. of Comm'rs of Nez Perce Cnty.*, 29 Idaho 203, 211, 158 P. 320, 322 (1916) *superseded on other grounds by constitutional amendment as recognized in Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 344, 353 P.2d 767, 771 (1960). We are not empowered to sit as a "bevy of Platonic Guardians," L. Hand, The Bill of Rights 73 (1958), that can ignore the original meaning of a constitutional provision in favor of what we think the wiser or better policy. For if we were, "the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be [no] more than useless." *People v. George*, 2 Idaho 813, 26 P. 983, 987 (1891) (Houston, J., concurring) (alteration added).

***18** Our approach to interpreting the Idaho Constitution based on the framers' intent—without regard to the social, economic, or moral preferences of the litigants before us—is not unique or new. Indeed, President Abraham Lincoln—two years before he signed the act creating the Idaho Territory—emulated the imperative to abstain from policy-driven constitutional interpretation when he denounced that the United States Supreme Court should ever take such an approach in interpreting the federal constitution:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

First Inaugural Address of President Abraham Lincoln (Mar. 4, 1861).

We possess no "roving commission" to rewrite the Idaho Constitution to create fundamental rights under the guise of constitutional interpretation. *See Nate*, 166 Idaho at 810, 464 P.3d at 296; *Cf. Shawver v. Huckleberry Ests., L.L.C.*, 140 Idaho 354, 365, 93 P.3d 685, 696 (2004) (explaining that courts have no "roving commission" to rewrite contracts). As explained, our duty is to "faithfully interpret" the Idaho Constitution through the framers' intent. *Miles*, 116 Idaho at 640, 778 P.2d at 762. Accordingly, we emphasize that in determining whether the Idaho Constitution contains an implicit fundamental right to abortion, the competing policies and moralities advanced, or incumbered by, the Civil Liability Law, the

Total Abortion Ban, and the 6-Week Ban must play no role in our decision. Our "province and duty" as the judicial branch is to "say what the law *is*[,]" not what it *ought* to be. *See Marbury*, 5 U.S. at 177 (emphasis added). Thus, as we have done since 1891, we look to the plain meaning of sections 1, 17, and 21 in Article I—as intended at the time of their adoption—to answer Petitioners' challenges.

2. The plain language of the Inalienable Rights Clause in Article I, section 1, provides the textual basis for recognition of implicit fundamental rights.

"[O]ur State Constitution is an instrument of limitation and not of grant[.]" *Smylie v. Williams*, 81 Idaho 335, 339, 341 P.2d 451, 453 (1959). This means that the Idaho Constitution is not the source of the rights it enshrines; rather, it limits the power of the government to infringe upon those rights. Within that framework, it is well-established that the legislature has "plenary power over all subjects of legislation not prohibited by the federal or state constitution[.]" *Wilson v. Perrault*, 6 Idaho 178, 180, 54 P. 617, 617 (1898). Prohibitions or limitations in the Idaho Constitution on this power "are either express or implied." *Id*. Thus, any implicit fundamental rights the framers intended to protect from that "broad field of police power" to "enact laws concerning the health, welfare and morals of the people[,]" must be based on the plain language of the Idaho Constitution. *Berry v. Koehler*, 84 Idaho 170, 176, 369 P.2d 1010, 1013 (1961).

The consolidated petitions before us illustrate this point. The Civil Liability Law, Total Abortion Ban, and 6-Week Ban are all laws enacted by the legislature in an exercise of its "police power" to address the "profound moral question" of abortion. *Dobbs*, 142 S. Ct. at 2284. *See State v. Leferink*, 133 Idaho 780, 784, 992 P.2d 775, 779 (1999) ("Under the broad authority of the police power, the legislature may enact laws concerning the health, safety, and welfare of the people as long as the regulations are not arbitrary or unreasonable."). However, if there is an express or implied prohibition against the laws Petitioners challenge, by way of an implied fundamental right to abortion *within* the Idaho Constitution, each law is presumptively unconstitutional unless it can survive our most exacting form of review, i.e., strict scrutiny. *See Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134. Accordingly, we must first identify the textual basis for the implicit fundamental right of abortion asserted by Petitioners. Petitioners point to sections 1, 17, and 21 in Article I as potential textual bases for an implicit fundamental right to abortion. Each of those sections remain unchanged since their original ratification in 1889, Proceedings and Debates 2049–52 (I. W. Hart ed., 1912), and read as follows:

> ***19 Section 1.** INALIENABLE RIGHTS OF MAN. All men are by nature free and equal, and have *certain inalienable rights*, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.
>
> [....]
>
> **Section 17.** UNREASONABLE SEARCHES AND SEIZURES PROHIBITED. The right of the people to be secure in their persons, houses, papers and effects against *unreasonable searches* and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.
>
> [....]
>
> **Section 21.** RESERVED RIGHTS NOT IMPAIRED. *This enumeration of rights shall not be construed to impair or deny other rights retained by the people.*

Idaho Const. Art. I, §§ 1, 17, 21 (emphasis added).

"In interpreting the Idaho Constitution, the rules of statutory construction apply." *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181. Thus, our objective is to "derive the intent" of those that adopted the provision, and we always begin with the plain language read in context of the entire instrument, such that no provision is read to be "void, superfluous, or redundant":

> The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

Id. (quoting *In Re Doe*, 168 Idaho 511, 516, 484 P.3d 195, 200 (2021) (cleaned up)).

"Where the constitutional provision is 'clear and unambiguous,' the expressed intent of the drafters must be given effect." *State v. Winkler*, 167 Idaho 527, 531, 473

P.3d 796, 800 (2020) (quoting *Leavitt v. Craven*, 154 Idaho 661, 667, 302 P.3d 1, 7 (2012). "A constitutional provision 'is ambiguous where reasonable minds might differ or be uncertain as to its meaning.' " *Winkler*, 167 Idaho at 531, 473 P.3d at 800 (quoting *City of Idaho Falls v. H-K Contractors, Inc.,* 163 Idaho 579, 582, 416 P.3d 951, 954 (2018)). Furthermore, the compilation of the Proceedings and Debates (I. W. Hart ed., 1912) from the Idaho constitutional convention of 1889 serves as the "best resource" for determining what meaning the framers intended to impart within sections that have remained unchanged since the constitution was ratified in 1889. *Clarke*, 165 Idaho at 397, 446 P.3d at 455.

a. The Search and Seizure Clause

We begin with the provision that was not intended by the drafters to enshrine implicit fundamental constitutional rights. Idaho's "Search and Seizure Clause" (contained in Article I, section 17) was plainly not intended by the framers to be a *source* of implicit substantive rights retained by the people of Idaho in 1889. At the 1889 constitutional convention, the Search and Seizure Clause was read and adopted with some debate, but the discussion only concerned a proposed change of the word "unreasonable" to "unlawful" in the phrase "unreasonable searches and seizures" which was ultimately rejected. *See* Proceedings and Debates 372, 1635-36 (I. W. Hart ed., 1912).

***20** When no debate takes place surrounding a particular provision, we may examine the framers' intent "in light of the practices at common law and the statutes of Idaho" when that section was adopted and ratified by the people of Idaho. *Clarke*, 165 Idaho at 397, 446 P.3d at 455 (quoting *State v. Creech*, 105 Idaho 362, 392, 670 P.2d 463, 493 (1983)). In 1889, when the Search and Seizure Clause was ratified, there was no common law precedent that would support reading the language "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated" as one of many emanating sources of unnamed substantive rights. Indeed, it would be another seventy-six years before that legal concept was first introduced into the federal constitution. *See Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (interpreting the federal Bill of Rights as implicitly guaranteeing a zone of privacy through so-called "penumbras" cast generally by the individual amendments yet emanating from no particular textual root). This is not to say Idaho's Search and Seizure Clause cannot afford greater protections than its federal counterpart in the Fourth Amendment. *See State v. Donato*, 135 Idaho 469, 471, 20 P.3d 5, 7 (2001) (explaining that Idaho's Search and Seizure Clause has provided greater protections than the Fourth Amendment based on "the uniqueness of our state, our Constitution, and our long-standing jurisprudence."). This is only to say the Search and Seizure Clause was not intended by the framers to enshrine substantive and implicit fundamental rights the people did not already possess and retain.

b. The Reserved Rights Clause

Next, a review of the plain language in the Reserved Rights Clause (Article I, section 21) shows it was not intended to be a repository of implicit substantive rights. Instead, it serves as an interpretive *instruction* that the listing of express rights in the Idaho Constitution "shall not be construed to impair or deny other rights retained by the people." Idaho Const. Art. I, § 21. Except for striking the word "popular" from the title of the provision, the Reserved Rights Clause was adopted without comment or debate. *See* Proceedings and Debates 392, 1636 (I. W. Hart ed., 1912).

We have said that the "convention which framed the [Idaho] Constitution had among its members many of the most prominent lawyers of the territory." *Higer v. Hansen*, 67 Idaho 45, 62, 170 P.2d 411, 422 (1946). We assume the convention had in mind the constitutions which had come before, and "that it was drafted with care and precision in the use of language and with a full understanding of the accepted meaning of every word used therein." *Id.* Because of this, the Reserved Rights Clause is properly viewed as nothing more than Idaho's version of the Ninth Amendment, a provision sitting within the federal constitution since 1791. The Ninth Amendment, with strikingly similar language to Idaho's Reserved Rights Clause, reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

There have been efforts to repurpose the Ninth Amendment to serve a substantive function. *See, e.g.*, *Griswold*, 381 U.S. at 484, 493–99, 85 S.Ct. 1678 (Goldberg, J., concurring) (explaining the "penumbras" and "emanations" theory of the Ninth Amendment also spoken of by the majority). However, a plain reading of the Ninth Amendment quickly forecloses that judicial "discovery" as an unwarranted constitutional detour. Indeed, the United States Supreme Court has generally retreated from that path. *See Dobbs*, 142 S. Ct. at 2245 (explaining that even in *Roe* there was no serious attempt to root a right to

abortion in the Ninth Amendment); *see also id.* at 2301 n.* (Thomas, J., concurring) (noting that since *Griswold*, "the Court, perhaps recognizing the facial absurdity of *Griswold*'s penumbral argument, has characterized the decision as one rooted in substantive due process") (citing *Obergefell v. Hodges*, 576 U.S. 644, 663, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) and *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)). Accordingly, there is no reason to think the Reserved Rights Clause was intended to mean anything different than what was understood of the Ninth Amendment at the time the Idaho Constitution was adopted. As explained by Justice Story at that time, the Ninth Amendment *instructs* the reader that the listing of particular rights does not mean any unlisted right is insecure or unprotected:

> ***21** [The Ninth Amendment] was manifestly introduced to prevent any perverse or ingenious misapplication of the wellknown [sic] maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others.

J. Story, Commentaries on the Constitution of the United States 651 (5th ed. 1891) (alteration added); *see also* The Federalist No. 84 (Alexander Hamilton) (objecting that because it would be impractical to enumerate all rights, it would be dangerous to list some and thereby imply that the government was unrestrained from interfering with those not listed); The Debates and Proceedings in the Congress of the United States, First Congress, First Sess., Vol. 1, 456 (Gales ed. 1834) (James Madison proposing the Ninth Amendment to appease federalist concerns over enumerated rights).

We have at times pointed to the Reserved Rights Clause when discussing "rights retained by the people" as they existed before the Idaho Constitution was adopted. *See, e.g.*, *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612–13, 308 P.2d 225, 231 (1957) ("The right of a parent to the custody, control, and society of his child is one of the highest known to the law.") (pointing to the Reserved Rights Clause and quoting *Martin v. Vincent*, 34 Idaho 432, 435, 201 P. 492, 493 (1921)). However, we have never expressly held that the framers intended the Reserved Rights Clause to be the *textual source* of implicit fundamental rights. Indeed, in the only case where it might be said we did, we provided no justification for lumping the Reserved Rights Clause into our analysis that otherwise turned on the "zone of privacy" announced in *Griswold*, 381 U.S. at 484, 85 S.Ct. 1678, under the United States Constitution. *See Murphy v. Pocatello Sch. Dist. No. 25*, 94 Idaho 32, 37–38, 480 P.2d 878, 883–84 (1971) (pointing to the Reserved Rights Clause, along with the Inalienable Rights Clause and the Ninth Amendment, as protecting "the right to wear one's hair in a manner of his choice" and the "right of personal taste").

In sum, there is no legal support for the conclusion that the framers intended the Reserved Rights Clause to be a storehouse of implicit fundamental rights. Instead, it was plainly intended as an interpretive *instruction*.

c. The Inalienable Rights Clause

When the Search and Seizure and Reserved Rights Clauses are read in context of the Idaho Constitution as a whole, it is clear the framers intended the Inalienable Rights Clause (Article I, section 1) to enshrine implicit fundamental rights as they existed in 1889 when the people ratified that provision. Indeed, based on the instruction provided in the Reserved Rights Clause, the surrounding circumstances at the time of its adoption, and the effect of its plain language, no other conclusion could be reached. To reiterate, the Inalienable Rights Clause provides that:

> All men are by nature free and equal, and have *certain inalienable rights*, *among which* are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

Idaho Const. Art. I, § 1.

Although the Inalienable Rights Clause was adopted without debate at the 1889 constitutional convention, Proceedings and Debates 127–28, 1589 (I. W. Hart ed., 1912), the portions of the debates that do reference "inalienable" rights are illuminating. For example, in discussing the jury trial right in Article I, section 7, one delegate referred to "inalienable rights" in Article I as those rights the legislature "cannot take away." *Id.* at 228.

***22** In addition, yet another delegate, in commenting on a proposed version of the eminent domain power in Article I, section 14, echoed the understanding that the Inalienable Rights Clause was substantive in effect, and as he put it, like "a cow which gives a bucket of good milk":

> Mr. PARKER. I have submitted my substitute with the idea of preserving the individual rights of every citizen of this territory. In Sec. 1 of this Declaration of Rights which you have not adopted, I find that 'all men are by nature free and equal and have certain inalienable rights, among which are enjoying and defending life and liberty, acquiring, possessing and protecting property, pursuing happiness and securing safety.' *Now in this Sec. 1 you give us, the individuals of this community, the*

> *right to acquire and possess property, but in this Section 14, as it is drafted now, these rights are taken away. This convention, in submitting this section in its present form, is in the position of a cow which gives a bucket of good milk and then kicks it over.*

Proceedings and Debates 291 (I. W. Hart ed., 1912) (emphasis added).

Next, when we look at the plain language of the Inalienable Rights Clause, paired with the instruction in the Reserved Rights Clause, it is clear that the framers did not intend its explicit list of rights to exhaust those "retained" by the people in 1889. Based on the dialogue of the delegates at the 1889 constitutional convention, the framers defined the word "inalienable rights" in the same way it is defined today: those rights that "cannot be transferred or surrendered; esp., a natural right such as the right to own property." *See* Right ("inalienable right"), Black's Law Dictionary (11th ed. 2019). The Inalienable Rights Clause expressly includes the rights to life, liberty, property, happiness, and safety. Idaho Const. Art. I, § 1. However, this list is prefaced with the connective term "among which" that, when read with the instruction in the Reserved Rights Clause, plainly indicates the framers intended the list of rights in the Inalienable Rights Clause to be non-exhaustive. *Cf. State v. McKean*, 159 Idaho 75, 356 P.3d 368 (2015) (explaining that a list prefaced by the words "such as" is clearly meant by the legislature to be "non-exclusive").

Indeed, to read the Inalienable Rights Clause otherwise would not only require us to engage in the type of analysis that the Reserved Rights Clause explicitly forbids—it also runs contrary to our rules of construction. *See Idaho Press Club, Inc.*, 142 Idaho at 642, 132 P.3d at 399 (holding that the *expressio unius est exclusio alterius* rule of construction—i.e., to express one thing is to exclude another—only applies when the Idaho Constitution "expressly limits" an enumerated list of powers because the Constitution is an instrument of limitation, not of grant).

In addition, and perhaps most importantly, Idaho's framers specifically included the Inalienable Rights Clause *within* the text of the Idaho Constitution while the framers of the United States Constitution did not do the same. *Compare* Idaho Const. Art. I, § 1 *with* U.S. Const. Instead, the only mention of "inalienable rights" at the federal level is found in the aspirational, but legally inoperative, Declaration of Independence where it states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). Given the plain language of the Idaho Constitution, we have no need to adopt an ever-expanding interpretation of the word "liberty" within the Inalienable Rights Clause as the textual basis for an implicit fundamental right as the United States Supreme Court has done in interpreting the word "liberty" within the Due Process Clause of the Fourteenth Amendment. *See Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Thus, when a party alleges the framers intended the Inalienable Rights Clause to protect an implicit fundamental right (e.g., abortion), we resolve that question with the test discussed below, and if the framers and adopters so intended, it is protected by the Inalienable Rights Clause without resort to reading it into a previously listed right.

3. The "deeply rooted" test determines whether the Inalienable Rights Clause implicitly enshrined a particular right as fundamental in 1889.

***23** Now that we have established the textual basis for implied fundamental rights, we must set forth the test for determining whether an alleged right was intended by the framers to be implicitly protected as a "fundamental" right. We have said "that a right is fundamental under the Idaho Constitution if it is expressed as a positive right, *or if it is implicit in Idaho's concept of ordered liberty*." *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181 (emphasis added) (internal quotations omitted). For example, in *Van Valkenburgh*, we applied the "positive right" test applicable to rights which are explicitly mentioned in the Idaho Constitution to hold that voting is a fundamental right. 135 Idaho at 126, 15 P.3d at 1134. However, we have never applied, nor explained the origin of, our "ordered liberty" test for *implicit* fundamental rights.

We first announced the "ordered liberty" test in *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993). In *Evans*, we were asked to decide whether "education" was a "fundamental right" under Article IX, section 1 for purposes of an equal protection challenge to Idaho's school funding system. *Id.* at 580–82, 850 P.2d at 731–33. Despite our previous reticence to adopt it in *Thompson v. Engelking*, 96 Idaho 793, 805, 537 P.2d 635, 647–48 (1975), the appellants in *Evans* relied on the "fundamental rights" definition used by the United States Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), and argued that education "should be considered a fundamental right for state equal protection analysis because it is expressly mentioned in [Article IX, section 1]." *Evans*, 123 Idaho at 581, 850 P.2d at 732. Under *Rodriguez*, if a right is

"explicitly or implicitly guaranteed" by the federal constitution then it is deemed "fundamental" such that any law invading it is presumptively unconstitutional and must pass strict scrutiny to survive. 411 U.S. at 33, 93 S.Ct. 1278.

In *Evans*, we explained that, up to that point, we had never held a particular constitutional right to be "fundamental" under the *Rodriguez* definition. 123 Idaho at 581, 850 P.2d at 732. Instead, we had used a case-by-case analysis of the nature of a right at issue, and had "stated in *dicta* that voting, procreation, and constitutional safeguards for persons accused of crimes are fundamental rights under the state constitution." *Id.* (emphasis in original). However, we determined it was time to "partially abandon" the case-by-case approach as it provided "no neutral criteria" to reach a decision and "could give the appearance of result-oriented decision making." *Id.*

We then rejected the broad definition of "fundamental rights" from *Rodriguez*, but nevertheless adopted the "fundamental rights" nomenclature and held that it applied only to those rights "expressed as a positive right" or "implicit in our State's concept of ordered liberty":

> We now hold that the "fundamental rights" found in our state constitution are those expressed as a positive right. We have considered but reject the appellants' suggestion that the *Rodriguez* definition of fundamental rights be adopted. Although the sections in our state constitution which impose a duty upon the government might be said to invest a derivative right in those to whom the duty is owed, the inclusion of those derivative rights in our definition of fundamental rights would be overly broad. For example, [Article III, section 24] provides that the government should promote temperance and morality; however, this section does not create a positive right to the enjoyment of the same. This is not to say that the state constitution is the exclusive source of fundamental rights. As noted above, this Court has stated that procreation is a fundamental right, and the right to procreate is not explicitly mentioned in the state constitution. *See Tarbox*, 107 Idaho at 960 n.1, 695 P.2d at 345 n.1. *Rights which are not directly guaranteed by the state constitution may be considered to be fundamental if they are implicit in our State's concept of ordered liberty.*

***24** *Evans*, 123 Idaho at 581–82, 850 P.2d at 732–33 (alteration and emphasis added).

Although we used the "ordered liberty" language in *Evans* when speaking of implicit fundamental rights, we had no occasion in *Evans* to apply an ordered liberty test—and to this day we have not applied it in any case. Instead, in *Evans*, we examined the *express* language in Article IX, section 1, and then held that "education is not a fundamental right because it is not a right directly guaranteed by the state constitution." 123 Idaho at 582, 850 P.2d at 733 (pointing to our same conclusion in *Thompson*, 96 Idaho at 806, 537 P.2d at 648). However, in these original actions, the central question is whether a fundamental right to abortion is *implicitly* protected by the Inalienable Rights Clause. Thus, as the proper case has presented itself, we explain our "ordered liberty" test today.

The origin of the term "ordered liberty" can be traced to *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (Cardozo, J.), where the United States Supreme Court concluded the "liberty" prong of the Due Process Clause in the Fourteenth Amendment did not implicitly include the prohibition against double jeopardy from the Fifth Amendment. In *Palko*, the defendant was charged with first-degree murder, but at trial, the jury found him guilty of second-degree murder, and he was sentenced to life in prison. *Id.* at 320–21, 58 S.Ct. 149. Pursuant to a Connecticut statute, the state appealed, and a new trial was granted. *Id.* at 321, 58 S.Ct. 149. The defendant objected to the Connecticut statute as violative of the Due Process Clause of the Fourteenth Amendment because its effect "was to place him twice in jeopardy for the same offense." *Id.* However, his objection was overruled, and after the second jury found him guilty of first-degree murder, he was sentenced to death. *Id.* at 321–22, 58 S.Ct. 149.

On appeal, the Court in *Palko* explained that certain protections in the Bill of Rights, valid against the federal government, had been "found to be *implicit in the concept of ordered liberty*," and thus, through the "liberty" prong of the Due Process Clause in the Fourteenth Amendment, could be applied against state action (i.e., the Incorporation Doctrine). *Id.* at 324–25, 58 S.Ct. 149 (emphasis added) (citing decisions regarding freedom of speech, freedom of the press, free exercise of religion, the right of peaceable assembly, and the right of the accused to counsel). In *Palko*, the Court was faced with deciding whether the prohibition against double jeopardy set forth in the Fifth Amendment could be applied through the Fourteenth Amendment to prohibit Connecticut's action of putting the defendant twice in jeopardy. *Id.*

Critically, when explaining the appropriate test, the Court in *Palko* equated the "essence of a scheme of *ordered liberty*" with those principles " 'of justice so rooted in the *traditions* and *conscience of our people* as to be ranked as fundamental.' " *Id.* at 325, 58 S.Ct. 149 (emphasis added) (quoting *Snyder v. Com. of Mass.*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934) *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12

L.Ed.2d 653 (1964)). Yet, to answer the question before it, the Court in *Palko* made no attempt to analyze the deeply rooted "traditions and conscience of our people" as it relates to double jeopardy protection. *See Palko*, 302 U.S. at 325–28, 58 S.Ct. 149. Instead, the Court applied an abstract "ordered liberty" test that turned on generalized notions of fairness—case-by-case—which asked whether putting the defendant twice in jeopardy was "a hardship so acute and shocking that our *policy* will not endure it?" *Id.* at 328, 58 S.Ct. 149 (emphasis added). To this question, the Court replied: "The answer surely must be 'no.' " *Id.*

***25** In the view of the *Palko* majority, a second trial against the defendant was "not cruelty at all, nor even vexation in any immoderate degree[,]" because the state should have the "reciprocal privilege" of a second trial when reversible error infected the first. *Id.* at 328, 58 S.Ct. 149. In other words, *state* prosecutors putting defendants twice in jeopardy was seemingly fair to the *Palko* majority's sense of universal "justice"—despite the Fifth Amendment prohibiting *federal* prosecutors from doing the same. *See id.* at 325–28, 58 S.Ct. 149. Thus, the Court in *Palko* upheld the Connecticut statute as constitutional and affirmed the defendant's second conviction. *Id.* at 329, 58 S.Ct. 149.

The problem with the subjective "ordered liberty" test employed in *Palko* was made readily apparent by its overruling in *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (holding the Fifth Amendment double jeopardy prohibition *is* enforceable against the states as an implicit part of "liberty" in the Due Process Clause of the Fourteenth Amendment). In *Benton*, the Court explained that it had, by that time, "thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of fundamental fairness." *Id.* at 795, 89 S.Ct. 2056 (internal quotations omitted). Whether a constitutional right that applied to federal action was so "fundamental to the American scheme of justice," that it implicitly applied to state action could not be determined by merely examining whether its denial is "shocking to [a] universal sense of justice." *Id.* at 794–95, 89 S.Ct. 2056 (alteration added). In other words, the "watered-down, subjective version of the individual guarantees of the Bill of Rights" produced by the subjective "ordered liberty" test in *Palko* would no longer be tolerated. *See id.*

Instead, as the Court in *Benton* demonstrated, the principled way to answer whether a particular right is implicitly protected by the term "liberty" in the Due Process Clause of the Fourteenth Amendment is to examine whether the right has been "part of our constitutional *tradition*" and an "ideal *in our constitutional heritage*[.]" *Id.* (emphasis added). Using this mode of analysis, the Court in *Benton* concluded that the double jeopardy protection in the Fifth Amendment was valid against state action through the Fourteenth Amendment because the protection has "from the very beginning been part of our constitutional tradition[,]" like the "right to trial by jury," so as to be "clearly fundamental to the American scheme of justice." *Id.* at 795–96, 89 S.Ct. 2056 (quotations omitted) (pointing to its indisputable roots in ancient Greece and Rome, the common law of England, and the common law or constitution of nearly every state).

The analysis from *Benton*, and cases like it, was eventually developed into a test that focuses on whether a right is so "deeply rooted in this Nation's history and tradition" that it could be deemed fundamental to the American "scheme of ordered liberty" and implicitly read into the "liberty" prong of the Due Process Clause of the Fourteenth Amendment:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," *id.*, at 511, 85 S. Ct. at 1696 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L.Ed. 288 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *[Reno v.] Flores*, [507 U.S. 292] 302, 113 S. Ct. [1439], 1447, [123 L.Ed.2d 1 (1993)]; *Collins [v. City of Harker Heights, Tex.,* 503 U.S. 115] 125, 112 S. Ct. [1061] 1068, [, 117 L.Ed.2d 261 (1992)]; *Cruzan*, *supra*, at 277–278, 110 S. Ct. at 2850–2851. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins*, *supra*, at 125, 112 S. Ct. at 1068, that direct and restrain our exposition of the Due Process Clause. As we stated recently in Flores, the Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S. at 302, 113 S. Ct. at 1447.

***26** *Glucksberg*, 521 U.S. at 720–21, 117 S.Ct. 2258 (emphasis in original).

The United States Supreme Court has a long pedigree of examining whether a right is deeply rooted in history and tradition to determine—under the Incorporation Doctrine

and substantive due process—whether a particular right is so "fundamental" to the Nation's "scheme of ordered liberty," that it can be *implicitly* guaranteed by the term "liberty" in the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (holding the right to "bring up children" is fundamental as one of the "privileges long recognized at common law as essential to the orderly pursuit of happiness"); *Powell v. State of Ala.*, 287 U.S. 45, 59–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (holding the right to assistance of counsel is "fundamental" as evidenced by the history and practice of our nation); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (holding the right to "procreation" is "fundamental" as it is part of "the very existence and survival of the [human] race"); *Gideon v. Wainwright*, 372 U.S. 335, 340–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (holding the right to assistance of counsel for indigent criminal defendants in non-capital felony cases is "fundamental" after explaining that *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) had gathered the relevant "historical data" but reached wrong conclusion); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 277–279, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (holding the right of competent persons "to refuse lifesaving hydration and nutrition" is fundamental as informed by, among other things, the historical treatment of the right to informed consent); *Glucksberg*, 521 U.S. 702, 735, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (holding there is no "fundamental" right to assisted suicide because it is not "deeply rooted" in our history and tradition); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (holding the right to keep and bear arms is "fundamental" because it is "deeply rooted" in this Nation's heritage); *Timbs v. Indiana*, —— U.S. ——, 139 S. Ct. 682, 686–87, 203 L.Ed.2d 11 (2019) (holding right to protection against excessive fines is "fundamental to our scheme of ordered liberty," with "deep roots in our history and tradition" (cleaned up)).

The focus on the "deeply rooted" test to define the parameters of "ordered liberty" under the federal constitution was even employed in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), where the United States Supreme Court went to great lengths in attempting to justify a fundamental right to abortion as rooted in this Nation's history and traditions. *See* 410 U.S. at 129–152, 93 S.Ct. 705 (analyzing the history of abortion through ancient attitudes, the Hippocratic Oath, the common law, English statutory law, American statutory law, and the positions of the American Medical Association, the American Public Health Association, and the American Bar Association). However, the Court's decision in *Dobbs* thoroughly exposed *Roe*'s "faulty historical analysis" by "setting the record straight" that there is no support for a "deeply rooted" right to abortion in the common law of England, the common law of this country, the statutes of the states, the trends of the American territories, or the Nation's traditions immediately before *Roe* announced the right. *Dobbs*, 142 S. Ct. at 2249–2260.

***27** Indeed, even the dissent in *Dobbs* candidly made no effort to defend *Roe*'s flawed attempt at justifying a constitutional right to abortion as "deeply rooted" in our Nation's history and tradition such that it could be ranked "fundamental":

> The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? .... The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Id. at 2320–2323 (Breyer, Sotomayor, and Kagan, JJ., jointly dissenting).

Unlike the United States Supreme Court's use of the "liberty" prong of the Due Process Clause of the Fourteenth Amendment to provide a textual basis for implicit substantive rights, we have no reason to employ a "substantive utilization" of the Due Process Clause in the Idaho Constitution (Art. I, § 13) to decide Petitioners' challenge. *See Jones v. State Bd. of Med.*, 97 Idaho 859, 865, 555 P.2d 399, 405 (1976). As explained above, the Idaho Constitution, unlike the federal constitution, has a provision the framers intended to house implicit substantive rights: The Inalienable Rights Clause. Here, our task is to interpret the Idaho Constitution—not the United States Constitution. Thus, in the analysis below, we are only concerned with *Idaho*'s history, traditions, common law, and statutes when examining whether the Inalienable Rights Clause implicitly protects a right as fundamental.

We pause to emphasize that our "ordered liberty" test is not—nor should it be—a revival of the "ordered liberty" test in *Palko*. *See Evans*, 123 Idaho at 581, 850 P.2d at 732 (rejecting the case-by-case form of constitutional analysis employed in *Palko*). For if it were, the meaning of the Idaho Constitution would soon turn on arbitrary, unpredictable, and unprincipled decision-making criteria that made up the current justices' respective notions of a "universal sense of justice." *See Benton*, 395 U.S. at 794, 89 S.Ct. 2056. Adopting such a subjective "ordered liberty" test not only has no limiting principle—it also distracts from the original meaning of the Inalienable

Rights Clause and would leave this Court vulnerable to "subjective elements that are necessarily present" in examining implicit fundamental rights. *See* *Glucksberg*, 521 U.S. at 722, 117 S.Ct. 2258.

Indeed, that amorphous path was well-traveled by the United States Supreme Court in the line of cases starting with *Lochner v. New York*, 198 U.S. 45, 57, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (reading the trending economic theory of *laissez faire* into the "liberty" and "property" prongs of the Due Process Clause in the Fourteenth Amendment) and ending when it was rightly abandoned in *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 392, 57 S.Ct. 578, 81 L.Ed. 703, (1937) ("Liberty implies the absence of arbitrary restraint, not immunity from *reasonable regulations and prohibitions* imposed in the interests of the community." (quotations omitted) (emphasis added)).

In his dissent from *Lochner*, Justice Holmes admonished that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics[,]" because constitutions are "not intended to embody a particular economic theory[.]" 198 U.S. at 75, 25 S.Ct. 539 (Holmes, J., dissenting). However, constitutions may nevertheless be offended by laws if they violate our "fundamental principles as they have been understood by the *traditions* of *our people* and *our law*":

> ***28** [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States .... *I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.*

Id. at 75–76, 25 S.Ct. 539 (Holmes, J., dissenting) (emphasis and alteration added).

We heed this admonition. We will not take this Court down an interpretive path that turns on our own sincerely held personal policy preferences that may inevitably yield to a similarly well-intended self-correction in the future. *See, e.g.*, *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) (holding "[t]he concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental"), *superseded by* Tenn. Const. Art. 1, § 36 (2014) ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion."); *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 237–38 (Iowa 2018) (holding the due process clause in the Iowa Constitution protects abortion as a fundamental right), *overruled by* *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 742 (Iowa 2022) (holding the due process clause in the Iowa Constitution does not include a fundamental right to abortion). In short, constitutional interpretation should not be subject to the pendulum swing of prevailing social mores.

Ours is a "government of laws, and not of men." *Marbury*, 5 U.S. at 163. In accord with this principle, our approach to interpreting the Idaho Constitution must avoid subjective injections of what we think "fair," "just," or "good policy" to reach a desired outcome. We do not engage in "result-oriented decision making[,]" *Evans*, 123 Idaho at 581, 850 P.2d at 732, and we will not start now. As explained above, the Idaho Constitution can only mean what was intended by those who framed and adopted it. *Toncray v. Budge*, 14 Idaho 621, 646, 95 P. 26, 34 (1908). Indeed, the Idaho Constitution can only "grow" when it is properly amended by the people. Thus, we decline to make the "ordered liberty" test into a placeholder for what members of this Court might omnisciently think—no matter how principled or well-intended—are the implicit "inalienable rights" in Idaho's Constitution based on shifting personal and subjective policy preferences. This Court is the steward of the Idaho Constitution, not its editor.

The impetus of the "deeply rooted" analysis—which asks whether a right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental[,]" *Glucksberg*, 521 U.S. at 721, 117 S.Ct. 2258—serves the same purpose whether it is applied to the Due Process Clause of the Fourteenth Amendment or the Inalienable Rights Clause in the Idaho Constitution. It offers a predictable, consistent, neutral, and principled method of determining what rights were embedded within Idaho's "ordered liberty" when the Inalienable Rights Clause was ratified, and are thereby implicitly protected by it as "fundamental." *See* *Evans*, 123 Idaho at 581, 850 P.2d at 732 (searching for "neutral" decision-making criteria). Most importantly, its mode of analysis is consistent with our approach to interpreting the Idaho Constitution because it allows us to determine the original meaning of the Inalienable Rights Clause and the implicit rights it was intended to protect.

***29** With the framers' intent as our polestar, we hold that inalienable rights, which are not expressly guaranteed, may

nevertheless be implicitly protected as "fundamental rights" within the Inalienable Right Clause if the particular right is shown to be so rooted in the traditions and conscience of Idaho so as to be ranked fundamental. Our guideposts in this inquiry are Idaho's preexisting territorial laws; the Proceedings and Debates of the Constitutional Convention of Idaho 1889 (I. W. Hart ed., 1912); the surrounding statutes and common law; and the history and deeply held traditions of the people in Idaho when the Inalienable Rights Clause was ratified in 1889. *See Clarke*, 165 Idaho at 397, 446 P.3d at 455.

We emphasize that our holding today is not a license to read every infringement of an express or implied right in the Inalienable Rights Clause as warranting presumptive unconstitutionality and exacting judicial review, i.e., strict scrutiny. *See Reclaim Idaho*, 169 Idaho at 198, 497 P.3d at 444 (Brody, J., concurring in part and dissenting in part) (pointing out that a "reflexive application" of strict scrutiny will not always be warranted in cases "impacting fundamental rights"). "It would be carrying the protection of 'inalienable rights,' guaranteed by the Constitution, a long ways [sic] to say that that guaranty extends to a free and unlimited exercise of the whims, caprices, or proclivities ... for idleness, ignorance, crime, indigence, or any kindred dispositions or inclinations." *Ex parte Sharp*, 15 Idaho 120, 129-30, 96 P. 563, 565 (1908).

For example, the "right to own and enjoy private property" is secured by the Inalienable Rights Clause but it is also subject to "reasonable limitation and regulation by the state" despite its status as "one of the natural, inherent and inalienable rights of free men." *Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953). And many of our laws place significant limitations on the "right" to own and enjoy private property. *See, e.g.*, I.C. §§ 7-701 to -721 (eminent domain proceedings); I.C. §§ 18-5901 to -5906 (use of private property that constitutes a "public nuisance"); I.C. §§ 67-6501 to -6539 ("Local Land Use Planning Act"); I.C. §§ 55-101 to -3211 (regulating private property in general). Even the Idaho Constitution invades the right to private property. *See, e.g.*, IDAHO CONST. Art. I, § 14 (eminent domain).

When it comes to the inalienable right of "liberty," it is beyond dispute that many—if not all—of Idaho's criminal laws curtail, infringe, and invade upon the "liberty" of an individual to conduct themselves as they please in the public *and* private sphere. *See, e.g.*, I.C. §§ 18-1501 to -1523 (prohibiting injury to children, underage drinking, use of an "inhalant" "for the purpose of becoming under the influence," abuse, exploitation, or neglect of a vulnerable adult, abandoning a vulnerable adult, female genital mutilation of a child, sexual exploitation of a child, lewd conduct with minors, sexual battery of a minor, enticing of children, providing shelter to runaway children, sale or barter of children for adoption, and tattooing, branding, tanning, or body piercing certain minors); I.C. §§ 18-3301 to -3325 (prohibiting certain sales, conduct, possession, or use of certain firearms, explosives, and other deadly weapons); I.C. §§ 18-3801 to -3810 (prohibiting types of gambling); I.C. §§ 18-4001 to -4017 (prohibiting murder, manslaughter, assisting in suicide, while providing for justifiable homicide); I.C. §§ 18-901 to -925 (prohibiting assault, battery, felonious administering of drugs, removing a firearm from a law enforcement officer, abuse of school-teachers, hazing, "harassment, intimidation or bullying," domestic violence, sexual exploitation by a medical care provider, violating no contact orders, attempted strangulation, and sexual battery); I.C. §§ 18-1101 to -1104 (prohibiting bigamy); I.C. §§ 18-801 to -805 (prohibiting arson); I.C. §§ 18-1301 to -1362 (prohibiting bribery and corruption); I.C. §§ 18-5601 to -5631 (prohibiting prostitution); I.C. §§ 18-6601 to -6605 (prohibiting incest, sexual abuse of an animal, sexual abuse of human remains, and video voyeurism); I.C. § 37-2732 (prohibiting the manufacture, delivery, or possession of certain drugs); I.C. § 37-2732C (prohibiting being "under the influence of" certain drugs in public); *see also* Idaho Const. Art. I, § 4 ("Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.").

***30** We do not pass on the validity of the above laws impacting the inalienable rights of property and liberty. Rather, we merely point out that these laws form our social contract, and "[t]he ability of the legislature to make laws related to a fundamental right arises from the reality that, in an ordered society, few rights are absolute." *Reclaim Idaho*, 169 Idaho at 429, 497 P.3d at 183. As President Lincoln once said: " 'We all declare for Liberty; but in using the same word we do not all mean the same thing.' " *Dobbs*, 142 S. Ct. at 2247 (citation omitted). Indeed, the reasonable regulation of "liberty" and "property" is a power of the legislature necessary for an *ordered* society and government itself:

> It must be conceded that the *very necessity of government itself concedes a power to impose certain restrictions upon individual rights of life, liberty, and property, and the power to regulate the conduct of business as well as the conduct of the individual.* Did not constitutional government possess such power, it could not serve any useful purpose, and, without power to restrain individuals from transgressing the rights of others and to restrain them in their conduct, which is necessary to conserve and protect the rights of all, the government must fall. This power in government is what may be termed and denominated police power. It has

> been contended in many other courts, as it is here contended, that the Legislature has no power to restrict an individual in the carrying on of his business; that, to do so, is taking property without due process of law; that, to do so, denies him an inalienable right. These objections, however, have not received very favorable consideration by any of the courts of the land. The power of the Legislature to deal with the question is no longer in doubt. *It is conceded by all the courts that, under the police power of the state, the Legislature may restrict individuals in their conduct, may restrict them in their business, and, so long as such regulations are reasonable, they do not violate the provisions of the Constitution of the United States or of this state.*

State v. Dolan, 13 Idaho 693, 706-07, 92 P. 995, 998–999 (1907) (emphasis added). In other words, unlike the term "freedom"—which encompasses the broad notion that one can act however one pleases without any constraints—liberty recognizes that a free society can only truly be free when individual freedoms are circumscribed by reasonable laws duly enacted by the people for the benefit of society as whole. *See generally Cox v. State of New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) ("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.").

However, the legislature certainly cannot regulate the rights to "liberty" or "property" into "non-existence," *Reclaim Idaho*, 169 Idaho at 429, 497 P.3d at 183, such that the people of Idaho are subject to unreasonable and arbitrary governmental intrusions. Hence, our standard of review that requires laws to be rationally related to a legitimate governmental purpose in order to withstand the most basic form of constitutional scrutiny, i.e., rational basis review. *See Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999).

Here, it could be claimed that many of the above laws, such as those prohibiting personal drug use, prostitution, incest, bigamy, polygamy, gambling, domestic violence, and underage drinking significantly invade the "universal" notions of "bodily autonomy," "intimate family decision making," and "privacy" which Petitioners have used to conceive their purported right to abortion. Because of this, Petitioners' reliance on such expansive notions of "liberty" as the basis for a fundamental right to abortion would not only call a significant spectrum of our criminal laws into doubt, but it also attempts to divert our attention from the *actual* right Petitioners want this Court to announce. If a party contends a right should be *read into* the Inalienable Rights Clause as "fundamental," we must take special care to determine the particular interest at stake and right alleged. *See, e.g.*, *Glucksberg*, 521 U.S. at 722–23, 117 S.Ct. 2258 (rejecting the "right to die" formulation as generalized and imprecise, and instead asking: "[W]hether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." (alteration added)).

***31** Once we accurately frame the right alleged, only then can we examine whether that right, under the test articulated above, has been afforded heightened protection from the otherwise plenary "police powers" of the legislature so that we could fairly conclude transgressions against it are presumptively unconstitutional and are subject to our most demanding form of constitutional review, i.e., strict scrutiny. *See Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). At oral argument, Petitioners agreed that the fundamental right they seek is *not* "bodily autonomy," "intimate familial decisions," or "privacy." Instead, the precise interest at stake in this case is the "right to decide whether to terminate a pregnancy"—or, put more plainly, the "right to an abortion."

4. The Inalienable Rights Clause does not protect an implicit fundamental right to abortion.

Now that the textual basis and test for implicit fundamental rights is settled, we reach Petitioners' central argument. For the reasons discussed below, nothing in Idaho's territorial laws, territorial sessions, early publications, constitutional convention, statutes, common law, or early medical regulations, suggests that a right to abortion is "deeply rooted" in the history and traditions of Idaho. Thus, a "right to abortion" is not part of Idaho's "ordered liberty" such that it could be implicitly protected by, and *read into*, the Inalienable Rights Clause in the Idaho Constitution as a fundamental right. Beginning with Idaho's territorial days through to the ratification of the Inalienable Rights Clause in 1889, Petitioners have put forth no evidence that a *right* to an abortion was any part of the deeply held traditions or history of those who settled Idaho. Instead, as explained below, the territorial sessions, territorial laws, constitutional convention, and local publications at that time only point to the contrary conclusion.

During the territorial assembly's *first* session, less than a year after the Territory of Idaho was created in 1863, procuring an abortion was made a criminal offense punishable by "not less than two years, nor more than five years" in the "territorial prison[,]" except when the physician who procured it "deem[ed] it necessary" to "save [the] life" of the woman. Act of Feb. 4, 1864, ch. IV, § 42,

1863–64 Idaho Terr. Sess. Laws 443. This law applied at every gestational stage, unlike laws of other states that only criminalized abortion after "quickening"—or movement—of the fetus. *See, e.g.*, *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 650–51 (Miss. 1998) (discussing Miss. Code 1880, § 2884 which criminalized producing an abortion from a "woman pregnant with a quick child[.]" (emphasis removed)). The criminal prohibition against abortion passed unanimously. *See* H.R. Journal Idaho Terr., 1st Sess. 135–36 (Dec. 7, 1863, to Feb. 4, 1864) (passing H.B. No. 114—an "act concerning crimes and punishments"—unanimously); Council [Senate] Journal Idaho Terr., 1st Sess. 125 (Dec. 7, 1863, to Feb. 4, 1864) (passing the same bill unanimously).

Ten months later, at the second session, the territorial assembly reenacted the same criminal prohibition against abortion with the same narrow exception. *See* Act of Dec. 21, 1864, ch. III, § 42, 1864 Idaho Terr. Sess. Laws 305 (emphasis in original) (alteration added). Like the first session, the bill containing the criminal prohibition against abortion passed with little disagreement. *See* H.R. Journal Idaho Terr., 2nd Sess. 121–22 (Nov. 14, 1864, to Dec. 23, 1864) (passing Council Bill No. 40 "concerning crimes and punishments" with nine out of twelve members voting in favor after the "Committee on Judiciary" recommended its passage); Council [Senate] Journal Idaho Terr., 2nd Sess. 125 (Nov. 14, 1864, to Dec. 23, 1864) (passing the same bill unanimously).

***32** Eleven years later, members of the eighth territorial legislative session, whose journals from the House of Representatives and the Council for the Territory of Idaho can be found in manuscript (handwritten) form, reaffirmed their commitment to criminally prohibiting abortion and reenacted the same law. *See* Act of Jan. 14, 1875, ch. IV, § 42, 1874–75 Idaho Terr. Sess. Laws 328. The members at the territorial legislative sessions that passed these criminal abortion laws were not only part-time "citizen" legislators (like Idaho's legislature is today)—their intimate entwinement with the *people* of territorial Idaho is apparent by the fact that Idaho's territorial legislature also sat as a divorce court from 1870 to 1883 (i.e., from the sixth through the twelfth territorial sessions). *See, e.g.*, H.R. Journal Idaho Terr., 11th Sess. 170 (Dec. 13, 1880, to Feb. 10, 1881) (listing five house bills as "acts" that would divorce named individuals in the territory of Idaho); *see also* William John McConnell (U.S. Senator and Governor for Idaho), Early History of Idaho 367–68 (1912).

Next, and only two years before the constitutional convention in 1889, the laws and statutes of Idaho were compiled, revised, and reenacted at the fourteenth territorial session. Idaho's abortion law was amended; this time not only making it a crime to perform an abortion, but also making it a crime to submit to one. *See* R.S. §§ 6794, 6795 (1887). Between the thirteenth and fourteenth territorial sessions, three commissioners charged with revising and compiling the territorial laws—John S. Gray, Hon. R. Z. Johnson, and James H. Beatty (who had replaced Hon. H. E. Prickett after his unexpected death)—completed the "revision, compilation and consolation of the General Statutes of the Territory[.]" *See* H.R. Journal Idaho Terr., 14th Sess. 47 (Dec. 13, 1886, to Feb. 10, 1887).

This commission was not unfamiliar with the law in Idaho. For example, one of the commissioners—James H. Beatty—was a member of the Council at the Fourteenth Session for the Territory of Idaho (1886–87); a *vocal* delegate during the 1889 constitutional convention; Chief Justice of the Supreme Court for the Territory of Idaho from May 1889 to July 1890; and the first district judge for the United States District Court for the District of Idaho. *See* Council [Senate] Journal Idaho Terr., 14th Sess. 4 (Dec. 13, 1886, to Feb. 10, 1887); James H. Hawley, History of Idaho, the Gem of the Mountains, Vol. I 186, 190, 590 (1920); *see, e.g.*, Proceedings and Debates 7–9, 18, 25, 70, 134, 205, 277, 362, 420, 534, 619, 767, 873, 919, 1027, 1054, 1059, 1088, 1138, 1140, 1141, 1622, 1749, 1843, 1900, 1906 (I. W. Hart ed., 1912).

At the start of the fourteenth territorial session, Council Bill No. 14 adopted the commission's compilation (including the new criminal abortion laws codified in sections 6794 and 6795 of the Revised Statutes) with a unanimous vote in the Council and near unanimous vote in the House of Representatives. *See* Council [Senate] Journal Idaho Terr., 14th Sess. 43–44, 58. Thereafter, members of the fourteenth territorial session amended numerous sections within the commission's compilation, and included other new laws passed at the session, before the final version of the compilation was fully enacted and published as the Revised Statutes of 1887. *See* H.R. Journal Idaho Terr., 14th Sess. 69, 83, 93, 108, 124, 128, 143, 148–152, 163; Council [Senate] Journal Idaho Terr., 14th Sess. 52, 58, 63, 67, 74, 82, 110, 111–112, 123–24, 135, 148, 187, 210. During the session, no member moved to amend or repeal the laws in the compilation that criminally prohibited abortion before their final codification in sections 6794 and 6795 of the Revised Statutes of 1887. It is true that the initial compilation from the commission was not read out-loud in full at the fourteenth territorial session. *See* Council [Senate] Journal Idaho Terr., 14th Sess. 43–44, 58; H.R. Journal Idaho Terr., 14th Sess. 45–47. However, there is nothing to suggest that the members at that session—which included a principal drafter of the compilation (James H. Beatty)—did not know its contents.

***33** For example, late in the session, a "joint committee" investigated the compilation, compared it to the new laws enacted, and reported any changes that needed to be made before referring the overall text to two committees on "codification and revision" for publication in its final form as the Revised Statutes of 1887. *See* H.R. Journal Idaho Terr., 14th Sess. 148–151; *see also* Council [SENATE] Journal Idaho Terr., 14th Sess. 58 (Governor Edward A. Stevenson instructing the territorial assembly to use its "most careful attention" in incorporating the new laws passed at the session with those compiled by the commission who "spared neither time nor labor to present a complete code of laws for the Territory."). Moreover, as noted above, numerous sections *within* the compilation were selectively amended *during* the fourteenth territorial session. Thus, that no member moved to amend or repeal the criminal laws against abortion located in sections 6794 and 6795 suggests that neither was offensive to any "deeply rooted" tradition which might have viewed abortion as a fundamental right.

Next, in 1889, Idaho held its constitutional convention, and in the record documenting its discussions and debates, the words "abortion," "privacy," and "bodily autonomy" are nowhere to be found. *See* Proceedings and Debates 1–2046 (I. W. Hart ed., 1912). Petitioners have put forth no evidence, nor can we find any, that the framers at the convention discussed any of these topics in such a way that we could conclude they intended to implicitly protect abortion as a fundamental right when they drafted the Inalienable Rights Clause. On the contrary, some of the delegates at the convention—the framers of the Idaho Constitution—were the same individuals who passed the laws that criminalized abortion since Idaho's early territorial days.

For example, one of the delegates was Solomon Hasbrouck, a member of the House of Representatives at the Second Session for the Territory of Idaho twenty-five years before the 1889 constitutional convention. *See* H.R. Journal Idaho Terr., 2nd Sess. 3; Proceedings and Debates 7–9, 2090 (I. W. Hart ed., 1912). During the second territorial session, Hasbrouck—as part of a 16-3 majority between the total from the house and council—voted to reenact Idaho's law from its first territorial session that had (unanimously) made it a crime to procure an abortion unless it was necessary to "save" the life of the mother. *See* H.R. Journal Idaho Terr., 2nd Sess. 121–22 (passing Council Bill No. 40); Act of Dec. 21, 1864, ch. III, § 42, 1864 Idaho Terr. Sess. Laws 305 (criminally prohibiting abortion); *see also* H.R. Journal Idaho Terr., 1st Sess. 135–36 (passing H.B. No. 114 unanimously); Council [Senate] Journal Idaho Terr., 1st Sess. 125 (passing H.B. No. 114 unanimously); Act of Feb. 4, 1864, ch. IV, § 42, 1863–64 Idaho (Terr.) Laws 443 (criminally prohibiting abortion).

In addition, five of the members who enacted the criminal abortion laws in sections 6794 and 6795 of the Revised Statutes of 1887 were also delegates to the 1889 constitutional convention. These individuals included two members of the House of Representatives at the Fourteenth Session for the Territory of Idaho: A. S. Chaney and John S. Lewis, *see* H.R. Journal Idaho Terr., 14th Sess. 3–4; Proceedings and Debates 7–9, 2090 (I. W. Hart ed., 1912), and three members of the Council at the Fourteenth Session for the Territory of Idaho: James H. Beatty (commissioner for the Revised Statutes of 1887), James I. Crutcher, and Alexander E. Mayhew (President of the Council), *see* Council [Senate] Journal Idaho Terr., 14TH Sess. 4; Proceedings and Debates 7–9, 2090 (I. W. Hart ed., 1912). Furthermore, John S. Gray—the second of the three commissioners who compiled the Revised Statutes of 1887 and its criminal abortion laws—was also a delegate to the 1889 constitutional convention. *See id*.

With this many delegates at the constitutional convention involved in enacting the territorial abortion laws of Idaho—including two of the three commissioners for the Revised Statutes of 1887—one would reasonably expect that if abortion *were* a "deeply rooted" right integral to Idaho's "scheme of ordered liberty" at that time—some objection would have been lodged, discussion had, or protest made at the convention regarding the laws then in effect which criminalized both performing and submitting to an abortion. *See* R.S. §§ 6794, 6795 (1887). Instead, the Inalienable Rights Clause was framed, in part, by those *same* individuals who made abortion a crime except when necessary to preserve the life of the mother.

***34** Moreover, immediately after the convention, nine of the framers became members of the newly created Idaho House of Representatives and Senate for the First Legislative Session for the state of Idaho. *See* H.R. Journal Idaho, 1st Sess. 4 (Dec. 8, 1890, to Mar. 14, 1891) (Representatives Frank Steunenberg, J. W. Ballentine, Thomas Pyeatt, and Henry Armstrong); Senate Journal Idaho, 1st Sess. 3 (Dec. 8, 1890, to Mar. 14, 1891) (Senators John S. Gray, James M. Shoup, J. W. Brigham, E. S. Jewell, J. L. Underwood). During Idaho's first legislative session, no legislator—including the nine framers of the Idaho Constitution—took issue with the criminal abortion laws in sections 6794 and 6795 despite numerous other actions to amend or repeal provisions in the same Revised Statutes of 1887. *See* H.R. Journal Idaho, 1st Sess. 1–221; Senate Journal Idaho, 1st Sess. 1–222. Again, like its absence at the 1889 constitutional convention, the subject of abortion was altogether omitted,

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and no legislator found it necessary to challenge sections 6794 and 6795 as offensive to Idaho's heritage and scheme of "ordered liberty." In sum, nothing in Idaho's territorial sessions, territorial laws, constitutional convention, or first legislative session during statehood suggests the framers of the Idaho Constitution, when they drafted the Inalienable Rights Clause, implicitly intended to protect abortion as a fundamental right.

To combat this history, Petitioners argue that the "antiabortion sentiment" implied by the laws criminalizing abortion at that time do not suggest the majority of *people* in Idaho in 1889 (including the voters who ratified the Idaho Constitution) harbored the same attitudes towards abortion. In support of their argument, Petitioners point to "open and notorious public advertisements" for "known abortifacients" that were published in Idaho newspapers between 1884 and 1890. *See* Wood River Times (Hailey, Idaho Territory), Mar. 8, 1884, at 2 (advertisement for a women's health journal providing information "on the diseases of women" with "causes, symptoms, and a sure home treatment" for such things as "Falling of the Womb" and "Suppressed or Painful Menstruation"); The Caldwell Tribune (Caldwell, Idaho Territory), Mar. 20, 1885, at 7 (advertisement for "Female Pills" containing "Ergot, Tansy, Savine, Cotton Root and other good Monthly Female Regulators"); Idaho News (Blackfoot, Idaho), Aug. 6, 1887, at 3 (advertisement for "Dr. Pierce's Favorite Prescription" as a "powerful, invigorating tonic" that treats "those chronic weaknesses and distressing ailments peculiar to females," including "painful menstruation" and "unnatural suppressions"); Idaho Semi-Weekly World (Idaho City, Idaho Territory), Mar. 18, 1890, at 3 (advertisement for "Dr. Livingston's Tansy Wafers" to "restore suppressed menses," and delivered in a box "securely sealed from eyes of inquisitive people"); Idaho Semi-Weekly World (Idaho City, Idaho Territory), Apr. 4, 1890, at 3 (advertisements for "Faber's Golden Female Pills" taken by "prominent ladies monthly" and "[g]uaranteed to relieve suppressed menstruation").

Although such advertisements can be found in Idaho newspapers in the time surrounding the adoption of the Inalienable Rights Clause, they do not demonstrate that the people of Idaho at that time were largely *accepting* of abortion nor do they prove that all the advertised products were actually abortifacients masquerading as menstrual relief pills. Indeed, in 1887, the territorial assembly responded, and made it a "felony" for any person to "willfully publish[ ] any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion ... or who offers his services by any notice, advertisement or otherwise, to assist in the accomplish of any such purpose[.]" R.S. § 6843 (1887) (alteration added); *see also* R.C. § 6843 (1909) (same); C.S. § 8306 (1919) (same). A review of such advertisements surrounding 1887 shows they were often from out-of-state vendors and did not advertise their "female pills" or "invigorating tonics" as *directly* providing a means for producing a miscarriage or abortion. And contrary to Petitioners' suggestion, it was not unheard of to prosecute this type of crime. *Cf. U.S. v. Kelly*, 3 Sawy. 566, 26 F. Cas. 695, 696, (No. 15,514) (D. Nev. Mar. 22, 1876) (upholding an indictment against the publisher of a newspaper under section 3893 of the United States Revised Statutes for knowingly mailing an advertisement that gave information on where and how to obtain an abortion while noting that "[i]t is not to be expected that a quack doctor will advertise in plain express terms, that he will furnish the means ... to procure an abortion. Such an advertisement probably has never been, and never will be, published.").

***35** Nevertheless, when the topic of abortion itself is reviewed in newspapers from Idaho's territorial days to the time surrounding 1889—the alleged abortifacient advertisements become largely irrelevant. As illustrated below, many of the same newspapers Petitioners rely on show that prosecuting criminal abortion was just as "open and notorious" from Idaho's territorial days through to the time surrounding the adoption of the Inalienable Rights Clause.

For example, in 1879, a newspaper reported that William Rhett, a member of the "8th session of the Idaho Legislature," was arrested "for incest and lodged in jail in Mount Idaho Nez Perce [C]ounty" after his "oldest daughter," reported he had given her "medicine to produce an abortion" which resulted in her birthing the "child" stillborn. The Idaho Statesman (Boise, Idaho Territory), July 17, 1879, at 3. Rhett did not deny being the father—but claimed the girl was not his daughter and instead the daughter of "a prominent citizen of Northern Idaho, who has held important offices." *Id.* Six years later, in 1885, another article reported that a husband and wife had been charged as "accessories" to "the crime of abortion," allegedly committed two years prior, with the "victim" being a girl who had lived with the couple. The Ketchum Keystone (Ketchum, Idaho Territory), Aug. 29, 1885, at 2 (describing "the real abortionist being a doctor of Ada county").

Two years later, in 1887, an article reported that "Dr. Sanders, of Moscow" was charged with "manslaughter" after it was determined he had performed an abortion on a woman who then died a few days later. The Caldwell Tribune (Caldwell, Idaho Territory), July 9, 1887, at 1. Less than one week later, another newspaper reported on the "sad story of the death" of a girl from Goldendale,

Washington, who left town with a "villain, named Lode Waldrom" and died in Portland, Oregon, after Waldrom had an abortion performed on her but he then became "drunk and neglected her until it was too late for medical aid to save her." The Idaho Statesman (Boise, Idaho Territory), July 14, 1887, at 1. The article described the acts of Waldrom as "the most heinous crime against society" and commented that a "man who seeks to decoy and afterward ruin sweet innocence deserves to be cremated alive." *Id*.

One year after that, in 1888, another Idaho newspaper reported that the local "Dr. Biggars" had made a "hurried departure" from town after he was accused of performing an abortion. Wood River Times (Hailey, Idaho Territory), July 14, 1888, at 3. Another doctor claimed Dr. Biggars had been falsely accused, but nevertheless left town "as it would put him in a very unpleasant predicament and to considerable expense to even bear such an accusation." *Id*.

Two years later, in 1890, immediately after the Inalienable Rights Clause was ratified (and the year Idaho became a state), an article was published about "Dr. E. A. Crain" who had fled Missoula, Montana, the night before. The Idaho Statesman (Boise, Idaho), July 12, 1890, at 2. Reportedly, Dr. Crain had gained "some notoriety a few days ago by being implicated in the death of a woman" in Missoula through performing an abortion. *Id*. The article then reported that Dr. Crain had "forged several checks on a prominent party, and skipped for the coast, presumably Portland[.]" *Id*. In doing so, "[t]he doctor left his bondsmen in the abortion case to the tune of $800." The article stated that telegrams were sent to "Spokane, Portland and Tacoma for his arrest, but nothing has been heard of him yet." *Id*.

***36** Two years later, in 1892, an Idaho newspaper published a "comment" that an "[e]ight year" sentence by a court in Umatilla, Oregon, imposed "upon a man convicted of procuring an abortion" was "a heavy penalty" but "probably none too much" for "such a crime." Lewiston Teller (Lewiston, Idaho), Feb. 25, 1892, at 6. Six years later, in 1898, another article reported that "Dr. J. A. Moffitt" had been charged with "producing an abortion" after a woman he treated died of "blood poisoning"—but that the jury ultimately did not "find a bill against Dr. Moffitt[.]" Lewiston Teller (Lewiston, Idaho), July 15, 1898, at 1. One year after that, in 1899, another Idaho newspaper reported on "Mrs. Wright" who died under "peculiar circumstances." The Idaho Statesman (Boise, Idaho), Dec. 14, 1899, at 6. A coroner's jury was impaneled to investigate, and afterwards, "found that the woman came to her death from a shock resulting from an attempted abortion" but "the party guilty of the crime" was unknown. *Id*. At the time of her death, Mrs. Wright did not live with her husband, and had been boarding with William Beal "for some time." *Id*. The article states there was evidence that "strongly pointed" to Mrs. Wright as performing the abortion on herself, and that the fetus was "about four months old." *Id*.

One year later, in 1900, a newspaper published a summons in an action to annul a marriage where the husband alleged, he was "forced and compelled to participate in said marriage ceremony ... by threats made by [the wife] and by her father and mother, who had him arrested and threatened to swear falsely against him[,] and to accuse him in a court of justice of *attempting to commit an abortion*, and to send him to the state's prison, and that he participated in said marriage ceremony in order to avert the *shame and scandal* and the loss of his liberty[.]" Lewiston Teller (Lewiston, Idaho), Dec. 5, 1900, at 2 (emphasis and alterations added).

Two years later, in 1902 (just thirteen years after the Inalienable Rights Clause was ratified), the Idaho Statesman reported on "[o]ne of the most sensational prosecutions that has been known in the history this state" where warrants were issued for the arrest of Warden C. E. Arney and Dr. J. K. Dubois of the Idaho State Penitentiary based on an affidavit from the only female prisoner at the time, Joise Kensler, that each had caused her to have a criminal abortion. The Idaho Statesman (Boise, Idaho), Sept. 3, 1902, at 1. The article provides a detailed account, but summarized the "Story of the Case" leading to the warrants as follows:

> It seems that some time in July—at the time of the meeting of the board of pardons—H. W. Dunton, attorney for Mrs. Kensler, who had an application for pardon pending, informed Attorney General Martin that his client had advised him she was pregnant. The attorney general laid the matter before Secretary of State Bassett. The later expressed doubt of the truth of the story, but proposed that the warden be called down the next day. Mr. Martin wished to have an investigation made by the prison physician.
>
> The next day the governor was present and the matter was again discussed, but nothing definite was done. About that time the attorney general went north. When he returned some two weeks later he made inquiry about the matter and learned the woman had been ill. He then investigated on his own account, going to the prison with Mr. Dunton. They there learned that the crime had been committed on or about July 23.
>
> Mrs. Kensler told them that the warden and the physician had told her she must submit to it and she had taken the drugs sent her for the purpose.

> Her statement was eventually reduced to the form of an affidavit, and some confirmatory evidence was secured.

Id.

In her affidavit, made in support of the warrants, Kensler swore that both Warden Arney and Dr. Dubois were involved in procuring her unlawful abortion:

> I am a prisoner confined in the state penitentiary of the state of Idaho, undergoing a life sentence; aged 30 years, and I was in a pregnant condition, and on or about July 17, 1902, I disclosed my condition to C. E. Arney, warden of the state penitentiary, and that about that time I was visited by Dr. Dubois, prison physician, and advised by him to get rid of it, and that he would furnish her [sic] the medicine which would accomplish a miscarriage.
>
> ***37** That a few hours afterwards on the same day the medicine was brought by Mr. Chinn, one of the guards at the prison. I took the medicine as directed by said physician for three or four days, and that it produced an abortion on July 22, 1902, and that at time said abortion was produced I had been with child about four months.
>
> That said physician informed affiant that no one knew of the abortion but himself and warden [sic] and two others.

The Idaho Statesman (Boise, Idaho), Sept. 12, 1902, at 6.

Later, at the preliminary hearing, the prosecutor examined numerous witnesses who confirmed circumstances indicating a criminal abortion had been committed; however, Kensler changed her story on the stand, denied that she ever told Warden Arney or Dr. Dubois that she was pregnant, and instead testified that Attorney General Frank Martin and her attorney Mr. Dunton came to her and asked her to sign the affidavit. *Id*. Afterwards, the probate court dismissed the case against Warden Arney based on insufficient evidence, The Idaho Statesman (Boise, Idaho), Sept. 16, 1902, at 5, but allowed the case to move forward against Dr. Dubois. The Idaho Statesman (Boise, Idaho), Sept. 23, 1902, at 6. However, at some point, Kensler signed a second affidavit, and in it, exonerated both Warden Arney and Dr. Dubois. The Idaho Statesman (Boise, Idaho), Feb. 25, 1903, at 3 (reporting that a legislative committee later investigated and Kensler testified that she was influenced to repudiate her first affidavit and sign the second one "on promise of a pardon").

Although convictions were not secured, that prominent individuals like the warden and physician of the Idaho State Penitentiary were prosecuted at all indicates a strong public sentiment against any abortion not necessary to preserve the life of a woman. Indeed, for the next nine years, from 1904 to 1913, newspapers in Idaho continued to report on suspected criminal abortions and prosecutions. *See, e.g.*, The Teton Peak (St. Anthony, Idaho), Mar. 31, 1904, at 1 (reporting on an investigation into potential accomplices to a criminal abortion at the "famous Green House"); The Coeur d'Alene Press (Coeur d'Alene, Idaho), Sept. 2, 1905, at 1 (reporting that a woman died from procuring an abortion by medicine and that her husband was arrested but the case was eventually dismissed when the prosecution did not produce a witness); Lewiston Evening Teller (Lewiston, Idaho), July 29, 1908, at 1 (reporting that a "warrant has been issued for the arrest of William Fountain on a charge of attempting to procure and produce an abortion"); The Idaho Republican (Blackfoot, Idaho), Nov. 13, 1908, at 8 (reporting that "[t]he case of John Sayer and George Kite, charged with abortion, continued for the term"); The Idaho Statesman (Boise, Idaho), Jan. 3, 1913, at 7 (reporting that Ray Weaver was acquitted in Lincoln County on a charge of second degree murder for causing the death of a woman after sending her "oil of tansy" through the mail to procure an abortion but that he was later convicted in federal court for "sending a poison through the mails for the purpose of procuring an abortion").

In sum, the newspapers from Idaho's territorial days through the early 1900s show that abortion was not condoned but treated as a serious criminal offense. Petitioners have supplied no Idaho publications, and we have found none, that portrayed abortions at that time as anything *less* than a crime. Simply stated, there is nothing that shows the framers of the Inalienable Rights Clause—or the people of Idaho in 1889—held a deeply rooted tradition or heritage in treating abortion as a *fundamental right* beyond governmental proscription. To the contrary, the above history and territorial laws shows the only thing "deeply rooted" about abortion in Idaho was its status as a criminal offense, except when necessary to "preserve" the life of the woman.

***38** Next, when we examine the journals and reports of Idaho's early medical community, Idaho's early medical regulations, Idaho's statutes, and the common law of Idaho from 1889 to the announcement of a federal constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)—no support for a nascent right to abortion can be found. To begin, in 1897, eight years after the Inalienable Rights Clause was ratified, Idaho passed its first comprehensive laws regulating the practice of medicine. *See* 1897 Idaho Sess. Law 88. Four years earlier, in 1893, physicians in Idaho had gathered to form the "Idaho State Medical Society,"—the first organized medical association in Idaho, The Caldwell Tribune (Caldwell, Idaho), Sept. 16, 1893, at 5—which then

worked towards state regulation of the practice of medicine. The 1897 laws created the first state board of medical examiners which was to oversee the new medical licensing and registration requirements, applications, and professional discipline. 1897 Idaho Sess. Law 88, 88–94. Grounds for revoking a medical license, or denying an application for the same, were enumerated under eight types of "unprofessional or dishonorable conduct[.]" *Id*. at 93–94. The *first* ground listed was "[t]he procuring or aiding or abetting in procuring a criminal abortion." *Id*.

However, in late 1897, this Court held the law was void for failing to comply with the "express" command in Article III, section 15 that a bill must be read section by section before the legislative body votes on it. *Brown v. Collister*, 5 Idaho 589, 592-93, 51 P. 417, 418 (1897). Roughly two years later, in 1899, the legislature properly enacted what was essentially the same law from 1897. *See* 1899 Idaho Sess. Laws 345. The 1899 law granted "the governor the authority to appoint a board of medical examiners[,] which, among other things, had the authority to institute proceedings in the district court if it determined that the license of a physician or surgeon should be suspended, revoked, or canceled for unprofessional or dishonorable conduct." *Mena v. Idaho State Bd. of Med.*, 160 Idaho 56, 58–59, 368 P.3d 999, 1001–02 (2016) (internal quotations omitted). The law listed eight grounds for "unprofessional or dishonorable conduct," and again, "procuring or aiding or abetting in procuring a criminal abortion" was the *first* ground listed. 1899 Idaho Sess. Laws 345, 348. Procuring, aiding, or abetting in procuring a "criminal" abortion continued to be proscribed, and repeatedly reaffirmed, as a ground for medical discipline in Idaho from 1899 through the date *Roe* was handed down. *See* R.C. § 1352 (1909); C.S. § 2111 (1919); I.C. § 53-2107(9) (1932); 1949 Idaho Sess. Laws 27, 35 (I.C. § 54-1810 (1949)); 1977 Idaho Sess. Laws 536, 547 (I.C. § 18-1814 (1977)) (changing the word "criminal" to "unlawful"); *see also* I.C. § 54-1814(6) (2022) ("Performing or procuring an unlawful abortion or aiding or abetting the performing or procuring of an unlawful abortion.").

Returning to the early history of medical regulations in Idaho, in 1903, at the "Ninth Annual Meeting of the Idaho State Medical Society" in Boise, a resolution was introduced, stating that the "Idaho State Medical Society takes this opportunity of expressing their *continued approval* of the law regulating the practice of medicine and surgery in this State[.]" *Reports of Society Meetings*, Northwest Medicine Vol. I. 599 (Jan. to Dec. 1904) (emphasis added). "On motion the above resolution was adopted by the *unanimous* vote of the Society members present." *Id*.

In the years following 1903, Idaho physicians submitted articles to Northwest Medicine, submitted reports and data on the Idaho State Medical Society (whose name was later changed to the "Idaho State Medical Association"), and attended lectures and events with physicians from the Washington State Medical Association. In 1909, the Idaho State Medical Association joined with the state medical associations of Oregon and Washington and adopted Northwest Medicine as the official medical journal for Idaho, Oregon, and Washington. *See Society Meetings*, Northwest Medicine Vol. I. (new series) 27 (Aug. to Dec. 1909). The relevancy here being that articles in Northwest Medicine regularly condemned medical practitioners who performed voluntary abortions as engaging in an unethical, immoral, and criminal practice and as grounds to revoke a physician's medical license. For example, in a 1907 address before physicians, J. H. Lyons, M.D., President of the Washington State Medical Association, discussed the important line between "criminal abortions" (i.e., voluntary abortions) and "justifiable" abortions necessary to preserve the life of the mother. Northwest Medicine Vol. V. 289–96 (Jan. to Dec. 1907). Dr. Lyons discussed the immorality of voluntary abortion, not based on any particular set of religious beliefs, but based on the unborn child's "inalienable right" to life by the "mere fact of its existence" as a "human being":

> ***39** One of the greatest obstetricians whom the world has produced has said, "The life of the child does not belong to the physician." The truth of that statement cannot be successfully controverted. *The mere fact of the existence of a human being carries with it the right to a continuance of that existence, and this is an inalienable right, a natural right which is incorporated in every fiber of our being*, and no one, not even the physician, can justly deprive a human being of that right.

Northwest Medicine Vol. V. 291 (Jan. to Dec. 1907) (emphasis added).

In another article, Montgomery Russell, M.D., noted that criminal abortions had been "on the increase" since the 1840s due to "the spread of atrocious advertising by abortionists, and the open display and sale of alleged abortifcient [sic] nostrums by the druggist[.]" *Id*. at 300. Dr. Russell expressed that physicians widely knew "criminal abortion to be prominent among the great vices of the day." *Id*. However, he acknowledged the difficulty of discerning the true extent of the "problem" because statistics on criminal abortion "have never been, and never can be published showing the frequency of the crime ... for the deed is done secretly; the woman cannot be compelled by law to testify against herself, and the abortionist takes good care that there shall be no interruption while he performs the operation." *Id*. In his closing remarks, Dr. Russell explained his view that "[c]riminal abortion is

undoubtedly an abhorrent and villainous crime against the infant, the mother, the family circle, society and Nature." *Id*. at 304; *see also* Northwest Medicine Vol. VI. 374 (Jan. to Dec. 1908) (address from C. N. Suttner, M.D., President of the Washington State Medical Association, denouncing "abortionists" and stating that "[i]t is the solemn duty to give our united help to our boards of health and our state boards of medical examiners to revoke the licenses of these criminals.").

When Idaho's newspaper articles from 1879 to 1913, its criminal laws against abortion starting in 1864, and the statutory grounds for medical discipline starting in 1899 are considered together—there is plainly no support for a conclusion that abortion is a fundamental right deeply rooted in Idaho's history and tradition. Instead, all of the evidence indicates that in the time preceding and following the adoption of the Inalienable Rights Clause, the people of Idaho, the framers of its constitution, the territorial assembly, the state legislature, and the physicians of Idaho widely viewed abortion as a criminal offense and as grounds for medical discipline except when necessary to preserve the life of the mother.

In addition, when we turn to the statutes and common law of Idaho in the time between the adoption of the Inalienable Rights Clause and today—there is plainly no support for a conclusion that a right to abortion is deeply rooted in Idaho's history and traditions. For example, in 1909, twenty years after the Inalienable Rights Clause was ratified, the criminal prohibitions against abortion in the Revised Statutes (R.S. §§ 6794, 6795 (1887)) were reenacted, through the people's elected representatives, with minor word changes, in the newly compiled Idaho Revised Code. *See* R.C. §§ 6794, 6795 (1909); 1909 Idaho Sess. Laws 3. Ten years after that, in 1919, the people of Idaho again, through their elected representatives, recodified and reenacted the same criminal prohibitions against procuring or submitting to an abortion in the Idaho Compiled Statutes. *See* C.S. §§ 8281, 8282 (1919); 1919 Idaho Sess. Laws 4. Thirteen years later, in 1932, the same criminal prohibitions against abortion were again recodified in the early version of the Idaho Code. *See* I.C. §§ 17-1810, 17-1811 (1932). Fifteen years after that, when the modern version of the Idaho Code was compiled in 1947, the same criminal prohibitions were again recodified. *See* I.C. §§ 18-601, 18-602 (1947). In these criminal laws, the only exception to performing an abortion was when it was "necessary" to "preserve" the life of the pregnant woman.

***40** Idaho Code sections 18-601 and -602 remained in effect for the next twenty-five years and were only repealed after the United States Supreme Court announced a federal constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Moreover, in the same Act that repealed those sections, the legislature enacted a trigger provision that would reinstitute the *same* historical criminal laws against procuring, or submitting to, an abortion if *Roe* were ever overturned or "the states [were] again permitted to safeguard the lives of unborn infants before the twenty-fifth week of pregnancy." *See* 1973 Idaho Sess. Laws 442, 448; *see also* I.C. 18-613 (1979) (providing that sections 18-604 to -611 in Title 18 would be repealed, and sections 18-613 to -615 would become effective, on the occurrence those events). The trigger laws were modeled nearly word for word after those first enacted in 1887 (R.S. §§ 6794, 6795), and sat dormant for the next seventeen years until they were repealed in 1990. *See* 1990 Idaho Sess. Laws 464.

Turning to our common law, Petitioners are correct that our historical criminal abortions laws from 1864 to 1973 were never tested for constitutional validity in an appeal or direct action to the Idaho Supreme Court. However, Petitioners have pointed to nothing in this Court's decisions to warrant Petitioners' inference that had the historical criminal abortion laws been constitutionally challenged between 1864 and 1973, they would have been struck down as violative of an implicit "fundamental" right to abortion. On the contrary, the earliest decision of this Court touching on abortion, issued just twelve years after the Inalienable Rights Clause was ratified, acknowledged that Idaho had never followed the common law rule on abortion related to the "quickening" of a fetus, and further characterized abortion as "one of the worst" crimes "known to law" because it is "*destructive of a life unborn*" and "places in jeopardy the life" of the pregnant woman:

> At the common law an abortion could not be committed prior to the quickening of the fætus [sic]. This is not the case under our statutes.
>
> [....]
>
> *The crime for which appellant has been convicted is one of the worst known to the law. An unnatural abortion, brought about by means of drugs or instruments, violates decency, the best interests of society, the divine law, the law of nature, the criminal statutes of this state, and is not only destructive of a life unborn, but places in jeopardy the life of a human being,—the pregnant woman.* Both actors, when there are two, as in the case at bar, are guilty of felony, and ought to be punished by the law, if the woman survives; and, if she does not, then the person or persons participating in the abortion should be punished. This crime is one of grave consequences to society. The law prohibits it and prescribes severe penalties. The law ought to be strictly enforced. In a case

> of this kind, this court will not notice purely technical errors, which do not prejudice the substantial rights of the accused, for the purpose of reversing the verdict returned by the jury, especially, as in this case, where we are satisfied that substantial justice has been done.

State v. Alcorn, 7 Idaho 599, 606, 613-14, 64 P. 1014, 1016, 1019 (1901) (emphasis added) (affirming a conviction for "manslaughter" of a mother who died as a result of "a criminal operation performed by [the defendant] for the purpose of bringing about an abortion" (alteration added)).

In addition, in our decisions leading up to *Roe*—this Court again made no intimation that there was anything constitutionally suspect about the historical criminal abortion laws. *See State v. Sayer*, 23 Idaho 536, 537, 130 P. 458, 458 (1913) (reversing the conviction of John Sayer based on insufficiency of the evidence at trial); The Idaho Republican (Blackfoot, Idaho), July 24, 1908, at 1 (reporting on the charges against John Sayer and George Kite for procuring a criminal abortion); *Nash v. Meyer*, 54 Idaho 283, 286-87, 31 P.2d 273, 274, 280 (1934) (holding that if a married couple consented to the performance of an "illegal" abortion, neither can recover damages against the surgeon on the ground of negligence and noting that laws criminalizing abortion are designed to "discourage abortions because thereby the life of a human being, the unborn child, is taken"); *State v. Proud*, 74 Idaho 429, 436–40, 262 P.2d 1016, 1020–23 (1953) (reversing a conviction under Idaho Code section 18-601 for procuring a criminal abortion based on the erroneous admission of hearsay evidence and remanding for a new trial); *State v. Rose*, 75 Idaho 59, 61, 267 P.2d 109, 110 (1954) (affirming a criminal conviction under Idaho Code section 18-601 for procuring an abortion not necessary to "preserve the life of the woman").

***41** Petitioners' final salvo is to pivot from its position that abortion was illegal but generally tolerated in Idaho and argue that we should ignore our history of intolerance for abortion and "centuries-old laws" because these were a product of "antiquated views" on who "could participate in civic, social, and political life," such that *any* reliance on Idaho's history and traditions "would perpetuate the disenfranchisement and discriminatory treatment of women that existed circa 1890." In support of their argument, Petitioners rely heavily on *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461, 491 (Kan. 2019), where the Kansas Supreme Court declared a fundamental right to abortion as implicitly protected by the inalienable rights clause in the Kansas Constitution. *See* Kan. Const. Bill of Rts. § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.").

In reaching that holding, the Kansas Supreme Court examined its *own* history (including multiple constitutional conventions and historical abortion laws); invented its *own* theory of "natural rights" under Kansas' inalienable rights clause, *see Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 740 n.19 (Iowa 2022) (noting that John Locke, a natural rights philosopher (and physician) relied on by the court in *Nauser*, "explicitly condemned abortion"); and pointed to its *own* precedent to hold Kansas' inalienable rights clause implicitly protected abortion as a fundamental right. *See Hodes & Nauser, MDs, P.A.*, 440 P.3d at 486–491 (rejecting the criminal laws against abortion in Kansas as "wholly unpersuasive" because they "reflect[ed] a paternalistic attitude" at that time that did not afford women "natural rights" as they are understood today).

Petitioners ask us to do the same here by giving little, if any, weight to the historic laws in Idaho that criminalized abortion from the first session of Idaho's territorial assembly to the date the Inalienable Rights Clause was ratified, and for the next 84 years leading up to *Roe*. However, as explained above, our duty is to interpret the Idaho Constitution based on its meaning at the time it was adopted by those who framed and adopted it. As discussed in Section VI.A.1, *supra*, if the meaning of a constitutional provision can be dismissed in favor of the policy preferences of a select few on the bench, "[w]ritten constitutions will be [no] more than useless." *George*, 2 Idaho 81, 26 P. at 987 (Houston, J., concurring) (alterations added). Thus, we cannot ignore the historic laws criminalizing abortion in Idaho—or the other evidence discussed above that reveals Idaho's traditions and history regarding abortion at the time the Inalienable Rights Clause was framed and adopted.

Moreover, Petitioners' reliance on the reasoning of the Kansas Supreme Court in *Hodes & Nauser* is misplaced for at least two reasons. First, the history of Kansas, along with its jurisprudence, is not *Idaho*'s history or jurisprudence. Thus, the decision in *Hodes & Nauser* does not answer what Idaho's "deeply rooted" traditions and history are when it comes to the issue of abortion. Second, Petitioners' argument here, which echoes much of the same reasoning in *Hodes & Nauser* where the majority concluded Kansas' criminal abortion laws were nothing but historical "paternalism" towards women, is contravened by the inconvenient fact that many *women* in Idaho are—and always have been—against non-therapeutic abortions for reasons that have nothing to do with discriminating against, or animus towards, women as a class. The absurdity of Petitioners' argument here is demonstrated by the fact that, if we were to accept it, and incorporate it into our reasoning, *this Court* would be consigning the beliefs of

many women in Idaho to nothing more than an invidious scheme foisted upon them to "perpetuate the disenfranchisement and discriminatory treatment of women that existed circa 1890[.]"

***42** It is true that women were not afforded equal legal and political rights when the Inalienable Rights Clause was adopted. Indeed, even after petitions for it, the framers at the 1889 convention declined to guarantee women the right of suffrage. *See* Proceedings and Debates 88–91, 164–74 (I. W. Hart, ed. 1912) (addresses of "Mrs. Skelton" and "Mrs. Duniway" petitioning the convention to guarantee the right of suffrage to women). However, unlike Kansas, which did not extend the right of suffrage to women until 1912 (nearly 51 years after the Kansas Constitution was adopted), the (male) voters of Idaho did so in 1896 through Idaho's second constitutional amendment, adopted just seven years after the Idaho Constitution and the Inalienable Rights Clause were ratified. *See* 1895 Idaho Sess. Laws 232 (proposed amendment to Article VI, section 2 ratified at the general election on November 3, 1896).

Furthermore, and unlike Kansas whose voters never did so, the voters of Idaho (men and women)—shortly after women's right to suffrage was guaranteed—amended the Idaho Constitution to "reserve to themselves" the ability to legislate directly through the initiative and referendum power. *See* 1911 Idaho Sess. Laws 785–87 (amendments to Article III, section 1 ratified at the general election on November 5, 1912); *see also Reclaim Idaho*, 169 Idaho at 430, 497 P.3d at 184 (holding that these powers are "fundamental rights" protected by the Idaho Constitution). Although enabling legislation related to the exercise of these powers was not effectively passed until 1933, *id.* at 414, 497 P.3d at 168, from 1933 until *Roe* was announced in 1973, there is no evidence of any attempt by the voters of Idaho (women or men) to repeal the abortion laws then in effect (I.C. §§ 17-1810, 17-1811 (1932) *recodified in* I.C. §§ 18-601, 18-602 (1947)), that criminalized procuring and submitting to an abortion except when "necessary" to "preserve" the life of the mother. *See* Cathy R. Silak, *The People Act, the Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 Idaho L. Rev. 1, 63 (1996) (cataloging the history of approved and defeated voter referendums and initiatives in Idaho). Nor was there any attempt after *Roe* to put those same criminal laws against abortion, reenacted as trigger laws (I.C. §§ 18-614, -615 (1979)), to a referendum prior to their repeal in 1990. *See id*.

Thus, there simply is no support for Petitioners' suggestion that had women in Idaho participated in the 1889 constitutional convention, ratified the Idaho Constitution in 1889, or been guaranteed the right of suffrage earlier than 1896, *the majority of men and women in Idaho at that time*, i.e., the "people of Idaho," would have treated abortion any differently than it was for the 77 years leading up to *Roe* when women did have the right of suffrage.

Finally, Petitioners' "paternalistic" argument that the challenged laws "perpetuate the disenfranchisement and discriminatory treatment of women circa 1890" is logically belied by the fact that—when taken together—the majority of *women* who served in the legislature at the time voted to pass the three laws Petitioners now challenge. *See* Senate Bill 1385 (2020) (Total Abortion Ban), Idaho Legislature, https://legislature.idaho.gov/sessioninfo/2020/legislation/S1385/ (passing with 5 out of 10 women state senators (27-7-1 overall), and 14 out of 25 women state representatives voting in favor (49-18-3 overall)); House Bill 366 (2021) (6-Week Ban and Fetal Heartbeat Act), Idaho Legislature, https://legislature.idaho.gov/sessioninfo/2021/legislation/H0366/ (passing with 5 out of 10 women senators voting in favor (1 absent) (25-7-3 overall), and 14 out of 21 women representatives voting in favor (53-16-1 overall)); Senate Bill 1309 (2022) (Civil Liability Law), Idaho Legislature, https://legislature.idaho.gov/sessioninfo/2022/legislation/S1309/ (passing with 7 out of 11 women state senators voting in favor (28-6-1 overall), and 14 out of 21 women state representatives (1 absent) voting in favor (51-14-5 overall)).

***43** We do not deny that women in Idaho have had to overcome substantial obstacles to obtain legal, political, and civic power since 1889. Our point is that contrary to Petitioners' framing of the challenged laws—and as the United States Supreme Court has explained when commenting on demonstrations outside abortion clinics—there are "common and respectable reasons" for opposing abortions that are unrelated to discriminatory or paternalistic views of women as a class:

> Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. *Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations.*

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Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (emphasis added).

For the reasons above, there is nothing to support the conclusion that either the framers of the Inalienable Rights Clause, or the people of Idaho in 1889, intended that provision to implicitly enshrine abortion as a fundamental right. It is our "province and duty" to only "say what the law *is*[,]" *Marbury*, 5 U.S. at 177; thus, we reach this conclusion without comment on the wisdom of the policies underlying the Total Abortion Ban, Civil Liability Law, and 6-Week Ban. Importantly, our holding today does not mean a fundamental right to abortion cannot be added to the Idaho Constitution—if the people so choose. The Idaho Constitution, unlike the reputedly rigid United States Constitution, has been successfully amended 135 times by the people of Idaho since it was ratified in 1889. *See* Idaho Const. Art. XX, §§ 1–4 (outlining the amendment process through a constitutional convention or the legislature subject to approval by a majority of voters). And a survey of the session laws reflecting those 135 amendments shows that while some were for structural or house-keeping purposes, many more touched on matters of policy across the political spectrum, including individual rights.

For example, as noted above, in 1895, six years after the Idaho Constitution was ratified, the legislature proposed an amendment to Article VI, section 2 to extend the right of suffrage to women. 1895 Idaho Sess. Laws 232. The next year, at the general election on November 3, 1896, the voters of Idaho ratified the amendment at the ballot box. Idaho was the fourth state to guarantee women the right to vote (following Wyoming, Colorado, and Utah, respectively), and did so twenty-four years before women achieved national suffrage through the Nineteenth Amendment to the United States Constitution on August 18, 1920.

In 1901, twelve years after the Idaho Constitution was ratified, the legislature proposed an amendment to Article XIII, section 2 that would require the legislature to pass laws to protect the health and safety of employees in factories, smelters, mines, and ore reduction works—industries that had been an economic lifeblood of Idaho since its territorial days. *See* 1901 Idaho Sess. Laws 311. The people of Idaho ratified the amendment at the general election on November 4, 1902.

***44** In 1911, twenty-two years after the Idaho Constitution was ratified, the legislature proposed an amendment to Article III, section 1 that changed the nature of Idaho's representative government and injected principles of direct democracy. *See* 1911 Idaho Sess. Laws 785–87. At the general election on November 5, 1912, the people of Idaho ratified that amendment—and in doing so, reserved to themselves the initiative and referendum powers. *Reclaim Idaho*, 169 Idaho at 413, 497 P.3d at 167. Through these "fundamental rights," *Reclaim Idaho*, 169 Idaho at 428, 497 P.3d at 182, the voters of Idaho reserved the power to legislate directly by: (1) proposing laws and enacting the same at the polls (initiative power); or (2) putting laws passed by the legislature to a popular vote (referendum power). Idaho Const. Art. III, § 1. These amendments were "policies of the Populist wave of that era[,]" Silak, *The People Act*, 33 Idaho L. Rev. at 63, and to this day, only twenty-six states have some form of voter initiative or referendum powers like those reserved in the Idaho Constitution.

In 1978, the legislature proposed an amendment to Article I, section 11 to protect the "right to keep and bear arms," and to "prevent the confiscation, licensure, registration, or special taxation of firearms or ammunition[.]" 1978 Idaho Sess. Laws 1031. Prior to 1978, the text of Article I, section 11 provided a much more limited right, as it protected only the right to "bear arms" for "security and defense" subject to the legislature's regulatory power:

> **Right to Keep and Bear Arms:** The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.

Idaho Const. Art. I, § 11 (1890); *see* Proceedings and Debates 2051 (I. W. Hart ed., 1912).

At the general election on November 7, 1978, the people of Idaho ratified the proposed amendment, and since that day, the right to keep and bear arms enjoys more expansive protections from the legislature's otherwise plenary power:

> **RIGHT TO KEEP AND BEAR ARMS.** *The people have the right to keep and bear arms, which right shall not be abridged*; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. *No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.*

Idaho Const. Art. I, § 11 (emphasis added).

In 1994, the legislature proposed an amendment to Article I, to add section 22, which would provide and protect the

rights of crime victims, including a right to restitution, a right to be present at all criminal proceedings, and a right to be "treated with fairness, respect, dignity and privacy" throughout the criminal justice process. 1994 Idaho Sess. Laws 1498. At the general election on November 8, 1994, the people of Idaho ratified this amendment.

In 2012, the legislature proposed an amendment to Article I, to add section 23, which would enshrine the "rights to hunt, fish and trap, including by the use of traditional methods" as a "valued part of the heritage of the State of Idaho[.]" 2012 Idaho Sess. Laws 957. This new section would also require that these rights "forever be preserved for the people and managed through the laws, rules and proclamations" in a manner that "preserve[s] the future of hunting, fishing and trapping[.]" Idaho Const. Art. I, § 23 (alteration added). In other words, in Idaho, "[p]ublic hunting, fishing and trapping of wildlife shall be a preferred means of managing wildlife." *Id*. At the general election on November 6, 2012, the people of Idaho ratified this amendment, and in doing so, expressed the desire for protection of conduct that plays an undeniably deep role in Idaho's history and tradition.

***45** The people of Idaho have not only amended the Idaho Constitution to *add* individual rights they thought worthy of protection from the plenary power of the legislature—they have also rejected two attempts by the legislature to overhaul the rights already protected *in* the Idaho Constitution. First, at the general election on November 5, 1918, the people of Idaho overwhelmingly rejected the legislature's call for a constitutional convention despite the senate's joint resolution requesting one while declaring that "[i]mportant changes have taken place in the social and economic life of the people of Idaho" since the Idaho Constitution was ratified in 1889. *See* 1917 Idaho Sess. Laws 505 (S.J.R. No. 2); *Historical Listings of Amendments and Initiatives (1892 through 1918)*, Idaho Secretary of State's Office, https://sos.idaho.gov/elect/inits/Hst92_18.htm (reporting 68.9 percent of voters as voting "no").

Second, at the general election on November 3, 1970, the people of Idaho rejected—in another landslide—the legislature's full revision of the Idaho Constitution. *See* 1970 Idaho Sess. Laws 739 (S.J.R. 122) (explaining that the legislature "does not deem it necessary to call a Constitutional Convention for the purpose of submitting a revised Constitution to the electors" and including the proposed text of the revision in full); *see also Historical Listings of Amendments and Initiatives (1960 through 1978)*, Idaho Secretary of State's Office, https://sos.idaho.gov/elect/inits/hst60_70.htm (reporting 65.9 percent of voters as voting "no"). Notably, one of the revisions the people rejected was the legislature's proposal to add an *explicit* "right of privacy" to the Inalienable Rights Clause—the same overarching right Petitioners heavily rely on today to clothe their requested right to abortion:

> All men are by nature free and equal and have certain inalienable rights, among them to enjoy and defend life and liberty; to acquire, possess, and protect property; *and to enjoy the right of privacy*; to have the quality of their environment preserved and enhanced; to pursue happiness and secure safety.

1970 Idaho Sess. Laws 739, 740 (emphasis added). It was this right to privacy—formally rejected by the people of Idaho—that formed much of the legal basis of *Roe*, as well as the legal theories asserted by Petitioners in this case.

To compare, some states included, or later added, an explicit "privacy" clause to their state constitution, and from this, four states have interpreted that clause as implicitly protecting abortion as a fundamental right. *See, e.g.*, *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968–69 (Alaska 1997) (holding the express privacy clause in Article I, section 22 of the Alaska Constitution—adopted by the people in 1972—protects abortion as a fundamental right); *People v. Belous*, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, 199 (1969) (holding the explicit "right of privacy" in Article I, section 1, of the California Constitution protects abortion as a fundamental right); *Gainesville Woman Care, LLC v. State*, 210 So.3d 1243, 1254 (Fla. 2017) (holding the express privacy clause in Article I, section 23 of the Florida Constitution—added in 1980—protects abortion as a fundamental right); *Armstrong v. State*, 296 Mont. 361, 989 P.2d 364, 387–90 (1999) (holding the Montana Constitution—fully revised and ratified by the people of Montana after a 1972 constitutional convention—protected abortion as a fundamental right through the express privacy clause in Article II, section 10, the "individual dignity" and "equal protection" clauses in Article II, section 4, the "inalienable rights" clause in Article III, section 3, the freedom of religion clauses in Article II, sections 5 and 7, and the "due process" clause in Article II, section 10).

Other states—which do not have an express privacy clause in their state constitutions, nevertheless declared abortion a fundamental right—but only after examining *their* state's history, criminal abortion statutes, and jurisprudence. *See, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461, 472–498 (2019) (walking through the history of Kansas, the history of the historical criminal abortion statutes in Kansas, a manufactured natural rights theory, and its own precedent, to then conclude the inalienable rights clause in the Kansas Constitution protects abortion as a fundamental right); *Pro-Choice Mississippi v. Fordice*,

716 So.2d 645, 650–51 (Miss. 1998) (pointing out that in 1890 abortion was legal in Mississippi up until the point of quickening, i.e., "some four to five months into pregnancy"—while relying on the analysis in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Mississippi's own "right to privacy" case law to declare abortion a fundamental right).

***46** On the other hand, six states have amended their state constitutions to unequivocally reject abortion as a fundamental right. *See* Ala. Const. Art. I, § 36.06(c) ("Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion."); Ark. Const. amend. LXVIII, § 2 ("The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."); La. Const. Art. I, § 20.1 ("To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion."); R.I. Const. Art. I, § 2 (applying to equal protection: "Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."); Tenn. Const. Art. 1, § 36 (2014) ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion."); W. Va. Const. Art. VI, § 57 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.").

The point being, as the Supreme Court recognized in *Dobbs*, is that each state is different. Thus, whether a state's constitution recognizes abortion as a fundamental right will differ from state to state, based on the language of each state's respective constitution and their respective traditions, history, statutes, and precedent. Idaho has its *own* constitution, and along with it, its *own* traditions, history, statutes, and precedent, that we must look to and respect whenever we are tasked with deciding whether a fundamental right exists that cannot be found within the four-corners of the Idaho Constitution.

The dissents reject our holding today, eschewing over 130 years of Idaho judicial precedent holding that this Court interprets the Idaho Constitution in accordance with the intent of the framers *at the time the Constitution was adopted and ratified*. *See* Section VI.A.1, *supra* (citing 20 Idaho Supreme Court opinions dating from 1891 through 2022 which affirm and reaffirm this rule of law). Rather than examine the history and traditions of our state, the dissent (J. Stegner) would adopt a test that turns on whether the conduct sought to be protected as a fundamental right (i.e., abortion) is (1) "substantially ... important"; (2) "implicates" one or more inalienable rights listed in Article I, section 1; and (3) is "inextricably linked" to one or more of those inalienable rights. The problem with this test is that it does not answer what conduct the framers *intended* Article I, section 1 to implicitly protect as "fundamental" and beyond the police power of the legislature. Instead, it would only answer what some members on this Court think Article I, section 1 *ought* to mean.

Importantly, abortion was a procedure known to the framers in 1889. Thus, determining their intent on this topic is neither difficult nor speculative, unlike more contemporary issues likely never envisioned in the nineteenth century, such as regulation of the Internet, airwaves, bitcoin, and drones. We can discern the framers' intent regarding abortion, not because we can read their minds, but because we can read the laws they passed before and after the 1889 convention, newspapers of the time, and medical journals. As a result, there is no reason for us to impose our own personal sensibilities as to what we think the Idaho Constitution should mean.

Like President Abraham Lincoln in his First Inaugural Address, *see* Section VI.A.1, *supra*, and Justice Holmes in his dissent in *Lochner*, *see* Section VI.A.3, *supra*, Justice Curtis, in his powerful dissent in *Dred Scott v. Sandford*, warned of the dangers of abandoning fixed rules of constitutional interpretation in favor of the personal predilections of judges:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

***47** 60 U.S. 19 How. 393, 621, 15 L. Ed. 691 (1857) (Curtis, J., dissenting) (emphasis added).

The dissent (J. Stegner) also takes aim at the majority's decision by contending we have disregarded the precedent set in *Murphy v. Pocatello School Dist. No. 25*, 94 Idaho 32, 38, 480 P.2d 878, 884 (1971) and *Berry v. Summers*, 76 Idaho 446, 451, 283 P.2d 1093, 1095 (1955). The dissent's position is that if the right to have long hair was a constitutionally protected liberty interest in *Murphy* and the right to pursue a particular occupation was a constitutionally protected liberty interest in *Berry,* then surely the right to abortion must be a constitutionally protected liberty interest because it is "substantially more important" than either of these rights. However, the dissent's reliance on these cases is misplaced, and its logic is flawed.

To begin with, *Murphy* and *Berry* are of dubious precedential value. In *Murphy*, the Court's analysis was

focused solely on constitutional rights under the *federal* constitution:

> Finally, but probably the most relevant constitutional premise of all, is the Ninth Amendment: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' Neither from the words themselves nor from the records and other contemporaneous material concerning the creation of the Ninth Amendment is it exactly clear what 'rights' are retained by the people. What is clear from an examination of the history and origin of the Ninth Amendment is that the absence of a specific constitutional provision dealing with the rights of privacy, personal teste [sic], the right to be left alone, and the like, does not compel the conclusion that no such right exists. On the contrary, the opposite conclusion is compelled. As in the Fifth and Fourteenth Amendment due process cases which have interpreted and necessarily expanded what life, liberty and pursuit of happiness mean, the determination of what rights exist and in which situations under the broad and general language of the Ninth Amendment is clearly, and again necessarily, left to judicial determination.
>
> Therefore, under both the Idaho Constitution, art. 1, §§ 1 and 21, and under the Ninth Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment (under *Griswold*, supra), we hold the right to wear one's hair in a manner of his choice to be a protected right of personal taste not to be interfered with by the state unless the state can meet the 'substantial burden' criteria similar to that set out in the cases holding in favor of the student, supra. For example, if it is established that the exercise of personal taste, as manifested by personal appearance, has substantially impaired some societal interest, then the state may intervene.

94 Idaho at 37–38, 480 P.2d at 883–84. The Court's discussion of the Idaho Constitution consisted of nothing more than a passing reference to Article I, section 1 with no indication that the state constitution was actually at issue and no explanation of how the Court reached its holding.

***48** Likewise, the *Berry* decision suffers from the same infirmities:

> Any such educational requirement and licensing as a dentist, as a prerequisite for performance of such services so performed by appellants and others similarly situated, is not a reasonable regulation and is not reasonably necessary for the protection of the public. So far as such amendment affects, or is intended to affect such independent occupation of dental mechanic or technician in the performance of mechanical work upon inert matter in a dental laboratory, the act is unconstitutional and void. We do not infer that the legislature may not *reasonably regulate* such artisan calling, or *reasonably regulate* the dental mechanic or technician who desires to practice such artisanry in the future; *but we do hold that the legislature may not do away with the vested rights of appellants and others similarly situated by prohibiting them from following their chosen occupation, legislatively recognized as an independent calling for thirty-four years last past*; *Fourteenth Amendment to the Constitution of the United States; Article I, §§ 1 and 13 of the Constitution of the State of Idaho.*

76 Idaho at 452, 283 P.2d at 1096 (emphasis added).

Beyond their limited precedential value, *Murphy* and *Berry* also do not provide the springboard for the dissent's logical leap. So as long as the liberty interest at stake in a given case is "substantially more important" than the rights announced in *Murphy* or *Berry*, the dissent would have this Court declare the alleged interest to be a fundamental right. Ranking one liberty interest as more important than another calls for a normative judgment that many Idahoans would disagree with, not a legal conclusion, and is not a sound premise upon which to conclude an implicit fundamental right exists. More importantly, the right to abortion the dissent seeks to enshrine in our Constitution *is* different than the right to refuse a haircut or choose a profession, which only implicate the rights of the individual. Unlike making a personal decision as to one's hairstyle or occupation, when it comes to abortion, there is the inescapable fact that the choice necessarily concerns the rights of another because the life of the unborn must be ended for this "substantially more important right" to be realized.

To be clear, the dissent (J. Stegner) would declare a fundamental right to abortion that goes far beyond the holding of both *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). In *Roe*, the Supreme Court held a woman's fundamental right to privacy protected an unfettered right to abortion only during the first trimester. *See* 410 U.S. at 164, 93 S.Ct. 705. After the first trimester, the state's ability to regulate was limited to "promoting its interest in the health of the mother" such that the state "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." *Id.*; *see also id.* at 163, 93 S.Ct. 705 (listing permissible examples that relate to the abortion procedure—but do not prohibit it). Once the pregnancy entered the third trimester, i.e., "the stage subsequent to viability"—at the time of *Roe*, the

state, "in promoting its interest in the potentiality of human life" could "if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id*. at 164–65, 93 S.Ct. 705. In *Casey*, the Supreme Court rejected the "rigid trimester" framework of *Roe*, retained the "viability" line, and announced an "undue burden" test that would permit states to regulate abortion procedures pre-viability, but not prohibit it. 505 U.S. at 873, 112 S.Ct. 2791.

***49** Today, the dissent (J. Stegner) would have the Court declare a woman has a fundamental right to abortion on demand *at all stages of pregnancy* regardless of "viability" or any other framework. This would mean that any legislative effort to regulate abortion—even a law that only prohibited abortions during the ninth month of pregnancy—would be presumptively unconstitutional and subject to this Court's most exacting form of judicial review: strict scrutiny. *See Reclaim Idaho*, 169 Idaho at 431, 497 P.3d at 185.

While the other dissenting colleague (J. Zahn), gives a nod to considering Idaho's history and traditions in determining whether a fundamental right to abortion exists, she too contends that the meaning of Idaho's Constitution must change with the times. Building on this premise, the dissent reasons that because Idaho statutes historically contained an exception to the criminalization of abortion to "save" (later changed to "preserve") the life of a mother, this statutory exception warrants the conclusion that there is an implicit fundamental right to abortion to prevent the death of the mother and to protect her health from injury, harm, or destruction. In fact, the dissent contends: "We *must* give effect to the language [of the historical statutes] as written, and the word 'preserve' extends to both the life and the health of the mother." (Emphasis and alterations added.)

Beyond making the obvious point that no party to this litigation has advocated that the Court recognize such a fundamental right, the Court rejected this type of legal reasoning just three years ago in *State v. Clarke*, when we made it clear that preexisting statutes and the common law may be used to help inform our interpretation of the Idaho Constitution, "but they are not the embodiment of, nor are they incorporated within, the Constitution":

> Recently, in [*State v. Green*, 158 Idaho 884, 888, 354 P.3d 446, 450 (2015)], this Court interpreted Idaho Code sections 19-603(6) and (7) and explained their relationship to Article I, Section 17 of the Idaho Constitution: "[b]ecause these subsequently enacted arrest standards did not exist at the time the Idaho Constitution was adopted, and because they were not incorporated by constitutional amendment, they cannot be considered part of the *constitutional* standard for what constitutes a reasonable seizure of the person." *Green*, 158 Idaho at 888–89, 354 P.3d at 450–51 (italics in original). As a corollary, *Green* held "[b]ecause the constitutional guarantee against unreasonable seizure of the person includes an arrest, the Idaho Constitution incorporated the principles regarding arrest in the Idaho statutory and common law in 1890 when the constitution was adopted." *Id.* at 888, 354 P.3d at 450.
>
> *However, we conclude that this statement in* Green *is overbroad.* Green *should stand for the principle that preexisting statutes and the common law may be used to help inform our interpretation of the Idaho Constitution, but they are not the embodiment of, nor are they incorporated within, the Constitution. To hold otherwise would elevate statutes and the common law that predate the Constitution's adoption to constitutional status.*

165 Idaho 393, 397, 446 P.3d 451, 455 (2019) (emphasis and alteration added).

Even more importantly, the logical inference made by the dissent (J. Zahn) does not hold. The legislature's decision to redefine an exception to the criminalization of abortion does not necessarily mean that the framers of our Constitution intended to enshrine the excepted conduct as a fundamental right. The more logical explanation is that the framers (some of whom were also legislators as explained previously) viewed abortion as a subject the legislature was free to regulate through its police powers like any other conduct. Thus, while the decision to change the word "save" to "preserve" was a policy decision within the plenary power of the legislative body, it does not equate to the recognition of a fundamental right that must be recognized by the judiciary.

***50** Critically, the dissent's premise—that the change from "save" to "preserve" by the 1887 Territorial Legislature somehow represented a meaningful change of perspective about abortion in nineteenth century Idaho—is flawed. Ironically, the dissent attempts to make this point using a twenty-first century online dictionary. Still, if one reads further, the same modern dictionary similarly defines "save" as "to rescue or deliver from danger or harm" and "to preserve or guard from injury, destruction, or loss." *Save*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/save (last accessed on December 31, 2022). Even reference to a more contemporary dictionary from the nineteenth century demonstrates that the two words were essentially synonymous in 1887. For example, "save" is broadly defined in the 1828 Webster's Dictionary as:

> To preserve from injury, destruction or evil of any kind; to rescue from danger; as, to save a house from the

> flames; to save a man from drowning; to save a family from ruin; to save a state from war.

Save, Webster's Dictionary (1828), https://webstersdictionary1828.com/Dictionary/save (last accessed on December 31, 2022). Yet, that same edition defines "preserve" much more narrowly as "[t]o keep or save from injury or destruction; to defend from evil." *Preserve,* Webster's Dictionary (1828), https://webstersdictionary1828.com/Dictionary/preserve (last accessed December 31, 2022). Thus, the territorial legislature's change to Idaho's abortion statute in 1887—from the word "save" to the essentially synonymous word "preserve"—does not provide a textual basis for assuming that the legislature intended to create or expand an existing right to an abortion.

Both dissents also raise the specter that if the Court were to interpret our Constitution as containing no fundamental right to abortion, a future legislature may eliminate all affirmative defenses and exceptions. What the legislature might do in the future does not drive our decisions. We issue opinions based on actual cases and controversies that come before us today—not the hypothetical fears of tomorrow. *Harris v. Cassia Cnty.*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984) ("The controversy must be definite and concrete, *touching on the legal relations of parties* having adverse legal interests.") (emphasis added) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241–42, 57 S.Ct. 461, 81 L.Ed. 617 (1937)). We do not issue advisory opinions. *Westover v. Idaho Ctys. Risk Mgmt. Program*, 164 Idaho 385, 390, 430 P.3d 1284, 1289 (2018). And, most importantly, we do not march into the political maelstrom by issuing opinions based on political party platforms or comments of elected officials. If the day comes that the legislature decides to prohibit abortion under all circumstances—without providing for legally justified abortions (i.e., the affirmative defenses) or exceptions—the Court may very well be called upon to take up the protections of the *express* right to enjoy life contained in Article I, section 1 of the Constitution or other arguments that may be advanced by a challenger. This, however, is not that day.

In sum, either dissent's articulation of *abortion* as a fundamental right would undoubtedly lead this Court down the same worn path the Supreme Court of the United States traversed between *Roe* and *Dobbs*, with a never-ending cycle of legislative enactment followed by protracted litigation. *See Dobbs*, 142 S. Ct. at 2271–75 (explaining the abandonment of *Roe*'s reasoning in *Casey*, and the "long list" of Federal Circuit conflicts that arose after *Casey*'s "undue burden" test was "[p]lucked from nowhere[,]" perpetuating "give-it-a-try litigation" and leaving judges with "an unwieldly and inappropriate task." (citations omitted and alteration added)). If this were to occur, is not difficult to envision this Court being transformed into Idaho's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards[,]" *Planned Parenthood v. Danforth*, 428 U.S. 52, 99, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (White, J., concurring in part and dissenting in part), based on nothing other than an "unrestrained imposition of [our] own extraconstitutional value preferences." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (White, J., dissenting) (alteration added), *overruled by Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), *overruled by Dobbs*, —— U.S. ——, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022). That is not the role of the judiciary.

***51** Instead, our role is to remain faithful to the fixed rule of law this Court has been following for over 130 years. To do otherwise usurps the policy-making role of the legislature and violates our obligation to maintain the separation of powers that forms the basis of our government. If the people of Idaho are dissatisfied with the policy choices the legislature has made or wish to enshrine a fundamental right to abortion in the Idaho Constitution, they can make these choices for themselves through the ballot box.

5. Because the Total Abortion Ban, 6-Week Ban, and Civil Liability Law are reasonably related to legitimate governmental purposes, they pass rational basis review.

When a law does not infringe on a fundamental right, we apply the rational basis standard of review to test whether it is a constitutionally permissible exercise of the legislature's plenary power to regulate the health, welfare, social, economic, and moral interests of the people. *See Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, P.3d 1006, 1012 (2011); *Koehler*, 84 Idaho at 176, 369 P.2d at 1013. Under rational basis review, the challenged law receives a "strong presumption of validity" and we will uphold the law if it "is rationally related to a legitimate governmental purpose." *Coghlan*, 133 Idaho at 396, 987 P.2d at 308. We agree with the United States Supreme Court that the following are legitimate governmental interests or purposes for regulating abortion:

> [R]espect for and preservation of prenatal life at all stages of development ...; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of

discrimination on the basis of race, sex, or disability. *Dobbs*, 142 S. Ct. at 2284 (alteration added).

Here, the Total Abortion Ban, 6-Week Ban, and Civil Liability Law are all rationally related to many of the above legitimate governmental interests (and the Respondents and Intervenors have advanced many of the same). For example, the Total Abortion Ban is rationally related to the government's legitimate interest in respecting and preserving prenatal fetal life at all stages of development by banning all abortions subject to certain affirmative defenses. *See* I.C. § 18-622(2)–(3); *see also* I.C. § 18-601 ("Idaho hereby expresses the fundamental importance of that profound interest ["in preserving the life of preborn children,"] and it is hereby declared to be the public policy of this state[.]" (alteration added and quotations omitted)). It is also rationally related to the government's legitimate interest in protecting maternal health and safety where it requires that a "physician" perform any necessary abortion—and that abortions are permitted if they are, in the physician's "good faith medical judgment[,]" "necessary to prevent the death of the pregnant woman." *See* I.C. § 18-622(3)(a)(i)–(ii). Furthermore, the Total Abortion Ban advances the interest in protecting maternal health where it permits elective abortions when the woman reports to law enforcement or child protective services that her pregnancy is the product of an act of rape or incest. *See* I.C. §§ 18-622(3)(b)(ii)–(iii).

The Total Abortion Ban also rationally advances the government's legitimate interests in maternal health and safety, and fetal life, where it requires the physician to act while "provid[ing] the best opportunity for the unborn child to survive, unless ... termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman." *See* I.C. 18-622(3)(a)(iii). As the Intervenors point out, this last requirement will, in some second and third trimester pregnancies, "eliminat[e] ... particularly gruesome or barbaric medical procedures" and "mitigat[e] fetal pain[.]" *See Dobbs*, 142 S. Ct. at 2284; *see* Section VI.C.1.c., *infra* (explaining this point further).

***52** Although the Total Abortion Ban does not include any *exceptions* to prosecuting a physician who performs an abortion, I.C. § 18-622(2)—and it does not include the broader "medical emergency" exception for abortions present in the 6-Week Ban and Civil Liability Law, I.C. §§ 18-8801(5), -8804(1)—the government's method of achieving its above purposes need only be *rationally* connected to those purposes. The choice to use an affirmative defense in the Total Abortion Ban rather than an outright exception, is nothing unusual to the law. Idaho law has long recognized a number of familiar defenses including, but not limited to, alibi, entrapment, necessity, and self-defense. Indeed, affirmative defenses are already employed in other types of criminal offenses where the government asserts its interest in protecting human life.

For example, the legislature criminally prohibits "[a]ll murder" perpetrated in certain ways or as a "willful, deliberate and premeditated killing" as "murder of the first degree." I.C. § 18-4003(a); *see also* I.C. § 18-4001 (defining "murder" as the "unlawful killing of a human including, but not limited to, *a human embryo or fetus*, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being." (emphasis added)). Based on this blanket prohibition, whenever a person kills another human being, they could be charged with murder in the first degree, arrested, and confined until trial (if bail is not granted). While a person can claim self-defense at any time during a homicide investigation, it is only later—if the case proceeds to trial—that the person accused of murder must prove the *affirmative defenses* of justifiable homicide, I.C. § 18-4009 (e.g., self-defense (ICJI 1517)), or excusable homicide, I.C. § 18-4012 (e.g., "accident and misfortune" (ICJI 1516)), to finally be "fully acquitted and discharged." I.C. § 18-4013. This is because there are no *exceptions* to the criminal prohibition against first degree murder.

Here, the affirmative defense in the Total Abortion Ban would operate in a substantially similar way and would require a jury instruction like those tailored for self-defense and excusable homicide. In brief, a physician who performed an "abortion" as defined in Idaho Code section 18-604(1) and prohibited by section 18-622(2), could be charged, arrested, and confined until trial *even if* the physician initially claims they did it to preserve the life of the mother, or based on reported rape or incest. Only later, at trial, would the physician be able to raise the affirmative defenses available in the Total Abortion Ban (I.C. § 18-622(3)) to argue it was a *justifiable* abortion that warrants acquittal and release.

Critically, the Idaho Constitution does not require that the Total Abortion Ban employ the *wisest* or *fairest* method of achieving its purpose. *See Coghlan*, 133 Idaho at 396, 987 P.2d at 308 ("On rational basis review, courts do not judge the wisdom or fairness of the legislation being challenged."). Thus, we again emphasize the important "distinction between constitutionality and wise policy." *See New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008) (Stevens, J., concurring) (noting his "esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws.' "). Nevertheless, and notwithstanding whether it was wise to use an affirmative

defense instead of an exception, the Total Abortion Ban is rationally related to the government's legitimate interests discussed above.

Next, the Civil Liability Law and 6-Week Ban are also rationally related to preserving and protecting fetal life, and to promoting maternal health and safety. Both laws protect fetal life by providing a civil cause of action (Civil Liability Law) and criminal penalties (6-Week Ban) for abortions performed "when a fetal heartbeat has been detected[.]" *See* I.C. §§ 18-8804(1), 18-8805(2), 18-8807(1). Both laws also promote maternal health and safety by providing exceptions to civil liability or criminal penalties when the abortion is performed in a "medical emergency," or after the woman has reported an act of rape or incest to law enforcement or child protective services. *See* I.C. § 18-8804(1).

***53** In sum, we conclude that the Total Abortion Ban, 6-Week Ban, and Civil Liability Law are all rationally related to legitimate governmental purposes. Thus, these laws are a constitutionally permissible exercise of the legislature's plenary power to enact regulations relating to the health, safety, and morals of the people in Idaho.

B. The Total Abortion Ban, 6-Week Ban, and Civil Liability Law do not violate the Equal Protection Clause in Idaho's Constitution.

Petitioners' next challenge the Total Abortion Ban, 6-Week Ban, and Civil Liability Law as violative of the Equal Protection Clause in the Idaho Constitution. Under this argument, Petitioners contend that the Total Abortion Ban, Civil Liability Law, and 6-Week Ban violate equal protection because: (1) the laws invidiously discriminate on the basis of sexual stereotypes, gender, and against medical providers who provide abortion services; and (2) the laws do not survive our heightened "means-focus" review, or our less demanding "rational basis" standard of review.

"The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity." *Olsen*, 117 Idaho at 709, 791 P.2d at 1288; *see also Bradbury*, 136 Idaho at 68, 28 P.3d at 1011. "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Olsen*, 117 Idaho at 709, 791 P.2d at 1288 (citing cases).

"This Court's equal protection analysis involves three steps: (1) identifying the classification under attack; (2) identifying the level of scrutiny under which the classification will be examined; and (3) determining whether the applicable standard has been satisfied." *Gomersall*, 168 Idaho at 318, 483 P.3d at 375. We recognize three standards of review for equal protection challenges to a statute under the Idaho Constitution: strict scrutiny, means-focus, and rational basis. *Olsen*, 117 Idaho at 709, 791 P.2d at 1288; *Gomersall*, 168 Idaho at 318, 483 P.3d at 375.

Strict scrutiny applies if the statute discriminates on the basis of a "suspect classification[.]" *Johnson v. Sunshine Min. Co.*, 106 Idaho 866, 869, 684 P.2d 268, 271 (1984); *see Osick v. Pub. Emp. Ret. Sys. of Idaho*, 122 Idaho 457, 462, 835 P.2d 1268, 1273 (1992) (listing "nationality, race, or religion" as suspect classifications). Strict scrutiny will also apply when we review the constitutionality of a statute that involves a fundamental right. *Gomersall*, 168 Idaho at 318, 483 P.3d at 375; *Reclaim Idaho*, 169 Idaho at 430, 497 P.3d at 184. Here, we are not dealing with statutes that turn on suspect classifications, and as explained above, the Idaho Constitution does not contain an implicit fundamental right to abortion. Thus, the Total Abortion Ban, 6-Week Ban, and Civil Liability Law are not subject to strict scrutiny. Nor does, as explained below, the heightened "means-focus" test apply.

1. The "means-focus" test does not apply to the Total Abortion Ban, 6-Week Ban, or Civil Liability Law because they are not obviously and invidiously discriminatory.

The "means-focus" test only applies when "the discriminatory character of a challenged statutory classification is [1] apparent on its face and [2] where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute[.]" *Gomersall*, 168 Idaho at 318, 483 P.3d at 375 (alterations added) (quoting *Olsen*, 117 Idaho at 710, 791 P.2d at 1289); *see also Tarbox*, 107 Idaho at 960, 695 P.2d at 345 (noting that the "means-focus" scrutiny will only be applied if the challenged classification is "blatantly" discriminatory). In all other cases, the "rational basis" test is applied. *Gomersall*, 168 Idaho at 318, 483 P.3d at 375.

***54** To satisfy the first prong, the classification created by the statute must be "obviously" and "invidiously" discriminatory. *Coghlan*, 133 Idaho at 396, 987 P.2d at 308. Importantly, "[n]ot every legislative classification which treats different classes of people differently can be said to be 'discriminatory,' much less 'obviously'

'invidiously discriminatory.' " *Id.* (alteration in original) (quoting *State v. Beam*, 115 Idaho 208, 212, 766 P.2d 678, 682 (1988)). For a classification to be "obviously" and "invidiously discriminatory" it "must distinguish between individuals or groups either odiously or on some other basis calculated to excite animosity or ill will." *Coghlan*, 133 Idaho at 396, 987 P.2d at 308.

One type of "invidious" discrimination occurs when a statute treats similarly situated individuals differently based on their sex alone. *See, e.g.*, *Harrigfeld v. Dist. Ct. of Seventh Jud. Dist. In & For Freemont Cnty.*, 95 Idaho 540, 545, 511 P.2d 822, 827 (1973) (invalidating a statutory scheme setting the age of majority for males at twenty-one and for females at eighteen as violative of the Equal Protection Clause in the Fourteenth Amendment); *see also Rudeen v. Cenarrusa*, 136 Idaho 560, 568, 38 P.3d 598 (2001) (explaining that the majority of Idaho cases treat the equal protection guarantees of the United States and Idaho Constitutions as "substantially equivalent" but not always "equivalent in [the] ultimate result" (alteration added)). Here, Petitioners argue that the Total Abortion Ban, 6-Week Ban, and Civil Liability Law obviously and invidiously discriminate on the basis of sex and gender stereotypes; thus, the heightened "means-focus" review should apply. We disagree.

Petitioners cannot satisfy the first prong required to trigger "means-focus" review because there is not an "obvious" and "invidious" discriminatory motive within the Total Abortion Ban, 6-Week Ban, and Civil Liability Law. Contrary to Petitioners' position, none of these statutes classifies on the basis of sex alone or sexual stereotypes because men and women are not similarly situated when it comes pregnancy and abortion. Only women are capable of pregnancy; thus, only women can have an abortion. This is not sex-based discrimination against women any more than a law regulating unlicensed vasectomies or prostate treatments would be discriminatory against men. Such laws are wholly unlike those challenged in *Harrigfeld*, 95 Idaho at 545, 511 P.2d at 827, where the statutory scheme facially discriminated against men but not women, *despite both being similarly situated*, when it comes to the age of majority. Thus, the prohibition and regulation of abortion by the Total Abortion Ban, 6-Week Ban, and Civil Liability Law do not create sex-based classifications that would warrant our heightened level of review. *See Dobbs*, 142 S. Ct. at 2245–46 (explaining that laws regulating abortion do not create sex-based classifications because they are based on biological differences).

In addition, there is no support for a conclusion that these laws are mere "pretext" for invidious discrimination against women. *See Dobbs*, 142 S. Ct. at 2245–46 ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the [law] "is mere "pretext" for invidious discrimination against members of one sex." (alteration added)). Here, the government's legitimate purposes in preventing abortion through these laws, *see supra*, does not amount to "animosity" or "ill will" towards one sex and not the other. Instead, due to biological differences, the goal of preventing abortions to protect unborn children *necessarily requires* a regulation that affects the only sex who can become pregnant, i.e., women.

***55** Furthermore, unlike Idaho's abortion statutes in effect before *Roe* was announced in 1973 (R.S. § 6795 (1887), R.C. § 6795 (1909), C.S. § 8282 (1919), I.C. § 17-1811 (1932), I.C. § 18-602 (1947)), and the dormant criminal ban in effect until its repeal in 1990 (I.C. § 18-615), the Total Abortion Ban, 6-Week Ban, and Civil Liability Law impose no criminal or civil penalties against the mother who submits to an abortion. *See* I.C. §§ 18-622(5), 18-8807, 18-8805. To the contrary, the Civil Liability Law provides the *mother* with a cause of action against medical providers who violate its provisions. *See* I.C. § 18-8807(1) ("Any female upon whom an abortion has been attempted or performed ... may maintain an action for ...."). Thus, nothing about these laws evidences a "pretext" to invidiously discriminate against women based on their sex.

Next, and contrary to Petitioners' position, these laws are not "obviously" and "invidiously" discriminatory on the basis of "outdated stereotypes about women's role in society." Petitioners assert that these laws "requir[e]" women to "sacrifice their minds and bodies in service of the biologically bestowed obligation to remain 'the center of home and family life' " and prevent women from participating equally in the workplace, or other areas of civil, social, and political life. However, a plain reading of the Total Abortion Ban, Civil Liability Law, and 6-Week Ban shows these laws require or prevent no such thing.

Petitioners' argument here is not only meritless, but specious because *it* relies on gender-based stereotypes by assuming all fathers are misogynistic, absentee, disinterested, unwilling to support the mother through pregnancy, uninvolved in parenting, and unwilling to stay home if needed while the mother works. Certainly, there are cases where a mother raises a child without the support of the father—but this only demonstrates Petitioners' error because there are *also* cases where the father raises a child without the support of the mother. Whether this occurs, and how the mother and father of a child ultimately apportion their parental duties—while balancing work, social, and political life—has nothing to do with the Total Abortion Ban, 6-Week Ban, and Civil Liability Law. In sum, we find

Petitioners' classification argument here wholly unpersuasive because *it* assumes the "outdated stereotypes" that (1) only mothers raise children—not fathers, and (2) all mothers who elect to stay home and raise their children do so against their will.

Instead, the Total Abortion Ban, 6-Week Ban, and Civil Liability Law are directed at the medical providers who perform unlawful abortions (regardless of whether the provider is male or female). This type of classification—medical providers who perform abortions versus those who do not—is not a classification which warrants heightened scrutiny. Under each law, medical providers who perform an abortion are treated equally. And the legislature's choice to provide a private cause of action through the Civil Liability Law against those medical providers who perform or assist in abortions is not "invidious" discrimination against the same. Contrary to Petitioners' suggestion, statutes that provide private causes of action against professionals and businesses for engaging in prohibited conduct are commonplace. *See, e.g.*, I.C. §§ 48-601, -608 ("Idaho Consumer Protection Act") (providing a private cause of action for consumers and businesses to protect against "unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce"); I.C. § 48-1007 ("Idaho Telephone Solicitation Act") (providing a private cause of action for any person who "suffers damages as a result of any act, conduct, or practice declared unlawful in this chapter"); I.C. § 48-1205 ("Idaho Charitable Solicitation Act") (providing a private cause of action for "[a]ny person who, pursuant to a charitable solicitation, suffers damages as a result of any act, conduct, or practice declared unlawful"); I.C. §§ 67-5907, -5909 ("Idaho Human Rights Act") (providing a private cause of action against certain employers for discrimination on the basis of "race, color, religion, sex or national origin").

***56** Finally, as the Respondents point out, the type of classification these laws make—those who perform abortions unrelated to medical necessity, rape, or incest, and those who do not—is no different than the implicit classification every law makes between those who do—and do not—violate its provisions. *Compare* I.C. § 18-622(2) (Total Abortion Ban), I.C. § 18-8807(1) (Civil Liability Law), I.C. §§ 18-8804, 18-8805 (6-Week Ban) *with* I.C. § 18-1401 ("Burglary") ("Every person who enters ...."), I.C. § 18-1904 ("Illegal Dividends and Reductions of Capital") (criminally prohibiting "[e]very director of any stock corporation" from making certain dividends or reductions of capital), I.C. §§ 23-1328A, -1335 (prohibiting certain trade practices between vintners, wineries, importers or dealers and distributors and making any violation or failure to comply a misdemeanor).

For these reasons, "means-focus" review does not apply to Petitioners' equal protection challenges against the Total Abortion Ban, Civil Liability Law, or the 6-Week Ban. Instead, our "rational basis" test applies to Petitioners' equal protection challenges against these laws.

2. The Total Abortion Ban, Civil Liability Law, and 6-Week Ban are rationally related to a legitimate governmental purpose.

Under our "rational basis" test, "a classification will pass scrutiny if it is rationally related to a legitimate governmental purpose." *Gomersall*, 168 Idaho at 320, 483 P.3d at 377. Only when a classification is based "solely on reasons totally unrelated to the pursuit of the state's goals" and "only if no grounds can be advanced to justify those goals" will we conclude the challenged statute violates the Equal Protection Clause. *Olsen*, 117 Idaho at 711, 791 P.2d at 1290.

Here, the classifications created by the Total Abortion Ban, 6-Week Ban, and Civil Liability Law are rationally related to legitimate governmental purposes for the same reasons explained in Section VI.A.5, *supra*. The only classification these laws create is between medical providers who perform or assist in abortions and medical providers who do not. That classification is not based on sex—both male and female doctors perform abortions—and there is nothing on the face of these laws that evidences an "invidious" discriminatory motive towards women or medical providers who perform abortions. As explained above, furthering the government's goal of protecting fetal life necessarily requires regulating the conduct of medical professionals no different than any other health, safety, and welfare focused statute or regulation. *See, e.g.*, I.C. §§ 39-4501 to -4516 ("The Medical Consent and Natural Death Act"); I.C. §§ 39-1301 to -1396 ("Hospital Licenses and Inspection"); I.C. §§ 39-5401 to -5408 ("Artificial Insemination"); IDAPA 16.03.02–.303 (regulating medical professionals in skilled nursing facilities); IDAPA 24.36.01–.704 (regulating the manufacture, distribution, and dispensing of controlled substances by licensees and registrants of the Idaho Board of Pharmacy).

In sum, the Idaho Constitution does not prohibit the legislature from attaching harsher consequences for violating the Total Abortion Ban, 6-Week Ban, or Civil Liability Law than contained in other regulations aimed at medical professionals. That choice is within the plenary power of the legislature, and we do not judge the wisdom of that choice on rational basis review. *See Coghlan*, 133

Idaho at 396, 987 P.2d at 308. Thus, we conclude the Total Abortion Ban, 6-Week Ban, and Civil Liability Law do not violate the Equal Protection Clause in the Idaho Constitution.

C. The Total Abortion Ban, 6-Week Ban, and Civil Liability Law do not violate the Due Process Clause in the Idaho Constitution.

Petitioners next lodge *facial* challenges against the Total Abortion Ban, 6-Week Ban, and Civil Liability Law under the Due Process Clause in the Idaho Constitution (Art. I, § 13). The thrust of Petitioners position is that the Total Abortion Ban and 6-Week Ban are void for vagueness *in toto* because no person of reasonable intelligence is capable of understanding what conduct is prohibited, and the Civil Liability Law is void *in toto* because it improperly imposes excessive or vague penalties. However, for the reasons below, Petitioners' facial challenges are meritless.

***57** "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *State v. Bitt*, 118 Idaho 584, 585, 798 P.2d 43, 44 (1990) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). In general, a law is void for vagueness under our Due Process Clause when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and permits arbitrary or discriminatory enforcement." *Bitt*, 118 Idaho at 585, 798 P.2d at 44 (internal quotations omitted); *see Cootz*, 117 Idaho at 40, 785 P.2d at 165 (explaining that the scope of our Due Process Clause is "substantially the same" as that of the Fourteenth Amendment but we are not "necessarily bound" by United States Supreme Court's interpretation of the Due Process Clause in the Fourteenth Amendment).

"A void for vagueness challenge is more favorably acknowledged and a more stringent vagueness test will be applied where a statute imposes a criminal penalty[.]" *State v. Cobb*, 132 Idaho 195, 198, 969 P.2d 244, 247 (1998). "Due process requires that a statute defining a crime be sufficiently explicit so all persons may know what conduct will subject them to penalties." *Leferink*, 133 Idaho at 783, 992 P.2d at 778 (quoting *State v. Lenz*, 103 Idaho 632, 634, 651 P.2d 566, 568 (Ct. App. 1982)). However, "[i]n most English words and phrases there lurk uncertainties," *Bitt*, 118 Idaho at 585, 798 P.2d at 44 (quoting *Rose v. Locke*, 423 U.S. 48, 50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975)), and because of this, "[a] statute should not be held void for vagueness if any practical interpretation can be given it." *Leferink*, 133 Idaho at 783, 992 P.2d at 778. Only when a law is written in terms "so ambiguous that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application' " is it "unconstitutionally vague." *Bitt*, 118 Idaho at 585, 798 P.2d at 44 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)).

When the challenged law "does not regulate constitutionally protected conduct, or a significant amount of such conduct," then our inquiry is whether (1) the law "gives notice to those who are subject to it," and (2) "contains guidelines and imposes sufficient discretion on those who must enforce" the law. *Cobb*, 132 Idaho at 198, 969 P.2d at 247; *Bitt*, 118 Idaho at 588, 798 P.2d at 47. Here, the Total Abortion Ban, 6-Week Ban, and Civil Liability Law do not regulate constitutionally protected conduct because the Inalienable Rights Clause does not contain an implicit fundamental right to abortion. Thus, the two-step inquiry above applies to Petitioners' challenges.

Under this inquiry, we emphasize the difference between an *as-applied* challenge and the "pre-enforcement" *facial* challenges Petitioners have brought. "A facial challenge to a statute or rule is 'purely a question of law.' " *Am. Falls Reservoir Dist. No.*, 143 Idaho at 870, 154 P.3d at 441 (quoting *Cobb*, 132 Idaho at 197, 969 P.2d at 246). And we have explained that "[f]or a facial constitutional challenge to succeed, the party must demonstrate that the law is unconstitutional in *all* of its applications." *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 870, 154 P.3d at 441 (emphasis in original); *see also Leferink*, 133 Idaho at 784, 992 P.2d at 779 ("It must be shown that the enactment is invalid *in toto*." (emphasis in original)).

In other words, for a law to be impermissibly vague in all its applications, the challenging party must show there is no "core of circumstances" to which the law "unquestionably could be constitutionally applied." *Cobb*, 132 Idaho at 198–99, 969 P.2d at 247–48; *see also Bitt*, 118 Idaho at 588, 798 P.2d at 47 (explaining the related doctrine of overbreadth: "[I]f the statute or ordinance is broad enough to catch everyone, it has no core of circumstances to which it applies and is therefore unconstitutionally vague."). Furthermore, in these challenges, we may avoid "possible infirmity for vagueness" by giving a "limiting judicial construction, consistent with the apparent legislative intent and comporting with constitutional limitations." *Cobb*, 132 Idaho at 198–99, 969 P.2d at 247–48; *Leferink*, 133 Idaho at 784, 992 P.2d at 779.

***58** "In contrast, to prove a statute is unconstitutional 'as applied', [sic] the party must only show that, as applied to the *defendant's conduct*, the statute is unconstitutional."

Am. Falls Reservoir Dist. No. 2, 143 Idaho at 870, 154 P.3d at 441 (emphasis added). Here, much of Petitioners' arguments point to "uncertainties at the margin" when it comes to the application of these laws. *See Planned Parenthood of Indiana & Kentucky, Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 605 (7th Cir. 2021). Such arguments are only appropriate in as-applied challenges—not facial attacks. *See Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 870, 154 P.3d at 441. Instead, our focus is whether these laws have a "core of circumstances" from which a person of ordinary intelligence could understand what conduct is prohibited and, in the case of a criminal law, whether the law is "sufficiently explicit so all persons may know what conduct will subject them to penalties." *Leferink*, 133 Idaho at 783, 992 P.2d at 778.

For the reasons explained below, the Total Abortion Ban and 6-Week Ban satisfy this requirement. In addition, we also conclude that the Civil Liability Law does not impose excessive or vague "penalties" in violation of our Due Process Clause.

1. Petitioners' facial challenge to the Total Abortion Ban fails because there is a core of circumstances to which the law unquestionably applies.

a. "Clinically diagnosable pregnancy"

Petitioners' first facial vagueness challenge under the Total Abortion Ban is to the term "clinically diagnosable pregnancy." Contrary to Petitioners' position, there is a core of circumstances to which this term unquestionably applies.

The challenged term is found within the statutory definition of "abortion" under the Total Abortion Ban. That provision provides in full:

> "Abortion" means 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 except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization or the implantation of a fertilized ovum within the uterus.

I.C. § 18-604(1) (emphasis added).

As the Respondents point out, this definition of "abortion" has remained unchanged since the legislature adopted it sixteen years ago. *See* 2006 Idaho Sess. Laws 1322 (amending I.C. § 18-604(1) to the above definition). Since that time, this definition of "abortion" and its component term "clinically diagnosable pregnancy" has applied to reporting requirements for induced abortions in Idaho. *See* I.C. § 39-261. A brief review of the Induced Abortion Annual Reports from 2014 to 2020 plainly shows physicians have no difficulty in understanding the definitions of "abortion" and "clinically diagnosable pregnancy" in Idaho Code section 18-604(1). *See, e.g.*, *2020 Induced Abortion Annual Report*, Idaho Dep't of Health and Welfare (January 2022), https://publicdocuments.dhw.idaho.gov/WebLink/DocView.aspx?id=22665&dbid=0&repo=PUBLIC-DOCUMENTS.

Petitioners' protest that Idaho Code section 18-604(1) does not specify *how* to clinically diagnose a pregnancy misses the point. The term "clinically diagnosable pregnancy" has a "core of circumstances" that a person of ordinary intelligence could unquestionably understand, e.g., by confirming a gestational sac or heartbeat using an ultrasound or detecting a fetal heartbeat with a fetoscope or handheld Doppler. Moreover, the definition of "abortion" uses the term "clinically diagnosable pregnancy"—it does not include the term "*chemically*" diagnosable pregnancy. *See* I.C. § 18-604(1). Thus, Petitioners' concerns over the methods of diagnosing a pregnancy through chemical means, e.g., by elevated hormones or home pregnancy tests, are also irrelevant under a facial challenge.

***59** Finally, Petitioners' concern over the Total Abortion Ban prohibiting ectopic and nonviable pregnancies from being terminated does not render the entire statute void-for-vagueness. The Total Abortion Ban only prohibits "abortion[s] as defined in [Title 18, Chapter 6]," I.C. § 18-622(2)—and ectopic and non-viable pregnancies do not fall within that definition. For purposes of the Total Abortion Ban, the only type of "pregnancy" that counts for purposes of prohibited "abortions" are those where the fetus is "developing[.]" *See* I.C. §§ 18-622(2), -604(11) (defining "pregnancy" as "the reproductive condition of having a *developing fetus in the body* and commences with fertilization." (emphasis added)). In the case of ectopic pregnancies, any "possible infirmity for vagueness" over whether a fetus could properly be deemed a "developing fetus" (when the fallopian tube, ovary, or abdominal cavity it implanted in *necessarily cannot support its growth*) can be resolved through a "limiting judicial construction, consistent with the apparent legislative intent[.]" *See Cobb*, 132 Idaho at 198–99, 969 P.2d at 247–48.

Consistent with the legislature's goal of protecting prenatal

fetal life at all stages of development where there is *some* chance of survival outside the womb, we conclude a "developing fetus" under the definition of "pregnancy" in Idaho Code section 18-604(11), does not contemplate ectopic pregnancies. Thus, treating an ectopic pregnancy, by removing the fetus is plainly not within the definition of "abortion" as criminally prohibited by the Total Abortion Ban (I.C. § 18-622(2)). In addition, because a fetus must be "developing" to fall under the definition of "pregnancy" in Idaho Code section 18-604(11), non-viable pregnancies (i.e., where the unborn child is no longer developing) are plainly not within the definition of "abortion" as criminalized by the Total Abortion Ban (I.C. § 18-622(2)).

Of note, we cannot use the same reasoning when it comes to the 6-Week Ban or the Civil Liability Law because the definition of "abortion" as applied to those laws, I.C. § 18-8801(1), does not contain a definition of "pregnancy" like that found under the Total Abortion Ban. *See* I.C. § 18-8801(1)–(5) (not defining "pregnancy"). Nevertheless, applying a limiting judicial construction, we conclude that ectopic, and non-viable pregnancies plainly fall within the "medical emergency" exception under the 6-Week Ban and Civil Liability Law (an exception the Total Abortion Ban does *not* contain). *See* I.C. § 18-8801(5).

Otherwise, and for the above reasons, Petitioners' facial challenge to the term "clinically diagnosable pregnancy" in the Total Abortion Ban is meritless.

b. "Necessary to prevent the death of the pregnant woman"

Petitioners' next facial challenge argues the phrase "necessary to prevent the death of the pregnant woman" is unconstitutionally vague. The challenged phrase is found within the requirements for asserting an affirmative defense to an "abortion" committed in violation of the Total Abortion Ban. That provision provides that an affirmative defense is available to a physician when, among other things, 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.* No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and
>
> [....]

I.C. § 18-622(3)(a)(ii) (emphasis added).

Petitioners argue that the phrase "necessary to prevent the death of the pregnant woman" is unconstitutionally vague because it gives no guidelines on whether the risk of death must be "imminent" or "substantial" in order to perform the abortion and allow the physician to assert this affirmative defense. However, Petitioners' argument misses the mark. The plain language of the above provision leaves wide room for the physician's "good faith medical judgment" on whether the abortion was "necessary to prevent the death of the pregnant woman" based on those facts known to the physician at that time. This is clearly a subjective standard, focusing on the particular physician's judgment. Contrary to Petitioners' arguments, the statute does not require *objective* certainty, or a particular level of immediacy, before the abortion can be "necessary" to save the woman's life. Instead, the statute uses broad language to allow for the "clinical judgment that physicians are routinely called upon to make for proper treatment of their patients." *See Spears v. State*, 278 So.2d 443, 445 (Miss. 1973) ("This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.").

***60** Importantly, unlike the other affirmative defenses noted in Section VI.A.5, *supra*, this means that the affirmative defense permitted by 18-622(3)(ii), does not place an objective reasonableness standard on the physician asserting the defense. For example, when asserting self-defense, Idaho Criminal Jury Instruction 1517 requires the defendant to prove:

> 1. The defendant must have believed that [the defendant] [another person] was in imminent danger of [death or great bodily harm] [bodily harm].
>
> 2. In addition to that belief, the defendant must have believed that the action the defendant took was necessary to save [the defendant] [another person] from the danger presented.
>
> 3. The circumstances must have been such that *a reasonable person, under similar circumstances, would have believed* that [the defendant] [another person] was in imminent danger of [death or great bodily injury] [bodily injury] and believed that the action taken was necessary.

(Emphasis added.) In other words, it is not enough for the defendant alone to believe that self-defense was necessary; he must prove that an objective review of the same circumstance would cause a reasonable person to reach the same conclusion. The Total Abortion Ban does not impose such a high standard. Instead, it imposes a subjective standard based on the individual physician's good faith medical judgment, that the abortion was necessary to

prevent the death of the woman. I.C. § 18-622(3)(ii).

Petitioners' objection that the phrase "necessary to prevent the death of the pregnant woman" should include more guidelines would not only necessarily *limit* the subjective nature of the affirmative defense, but it also improperly plucks the phrase from the sentence that gives it broad meaning. Contrary to Petitioners' position, there is a "core of circumstances" that a person of ordinary intelligence could unquestionably understand when it comes to whether his or her conduct satisfies the above affirmative defense requirement in Idaho Code section 18-622(3)(a)(ii). That "core of circumstances" includes every situation where, in the physician's good faith medical judgment, an abortion was "necessary" to prevent the death of the pregnant woman. *See Doe v. Bolton*, 410 U.S. 179, 192, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (rejecting a vagueness challenge to the term "necessary" in a similar Georgia abortion statute) *abrogated on other grounds by Dobbs*, ––– U.S. ––––, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022)). Thus, a "medical consensus" on what is "necessary" to prevent the death of the woman when it comes to abortion is not required for a physician to satisfy this affirmative defense.

Moreover, there is no "certain percent chance" requirement that death will occur under the term "necessary"—and to impute one would only add an objective component to a wholly subjective defense. Of course, a prosecutor may attempt to prove that the physician's subjective judgment that an abortion was "necessary to prevent the death of the pregnant woman" was not made in "good faith" by pointing to other medical experts on whether the abortion was, in their expert opinion, medically necessary. However, this does not make the affirmative defense requirement under Idaho Code section 18-622(3)(a)(ii) so vague that no person of ordinary intelligence could understand whether the physician exercised his medical judgment in "good faith." For these reasons, we conclude that Petitioners' facial challenge to the term "necessary to prevent the death of the pregnant woman" is meritless.

c. "[I]n the manner that ... provides the best opportunity for the unborn child to survive[.]"

***61** Petitioners' next facial challenge argues that the requirement an "abortion" be performed "in the manner that ... provides the best opportunity for the unborn child to survive" is unconstitutionally vague. The challenged phrase is also found within the requirements for asserting an affirmative defense to an "abortion" committed in violation of the Total Abortion Ban. The relevant provision provides in full:

> 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.* No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself[.]

I.C. § 18-622(3)(a)(iii) (emphasis added); *see also* I.C. § 18-622 (3)(b)(iv) (requiring compliance with the same).

In other words, when a physician asserts the affirmative defense to an "abortion" based on saving the woman's life, rape, or incest, the physician must also have performed the abortion in the *manner* that "provided the best opportunity for the unborn child to survive" except when "termination of the pregnancy in that manner would have posed a greater risk of the death of the woman." I.C. § 18-622(3)(a)(iii). Petitioners contend this requirement is impermissibly vague in multiple ways, but most fundamentally, the "entire premise of performing an abortion in which the unborn child survives is flawed." Petitioners further argue there is no limiting construction we can place on the requirement to save the statute.

We agree that a plain reading of the affirmative defense requirement in Idaho Code section 18-622(3)(a)(iii) is inconsistent with the definition of "abortion" in Idaho Code section 18-604(1). The affirmative defense provision requires, among other things, that the "abortion" be performed in a manner that provides "the best opportunity for the unborn child to survive." I.C. § 18-622(3)(a)(iii). However, by definition, an "abortion" is the "use of any means to *intentionally terminate* the clinically diagnosable pregnancy ... with knowledge that the termination by those means will, with reasonable likelihood, *cause the death of the unborn child*[.]" I.C. § 18-604(1) (emphasis added).

Despite that, this textual difficulty does not require us to conclude the entire Total Abortion Ban is impermissibly vague. Section 18-622(3)(a)(iii) simply requires that if a physician decides an abortion is necessary to save the life of the mother (I.C. § 18-622(3)(a)(ii)) or rape or incest has been reported (I.C. § 18-622(3)(b)(ii)–(iii)), the physician cannot *automatically* proceed to terminate the pregnancy in a manner that would necessarily end the life of the unborn child. Instead, the physician must first, using his "good faith medical judgment" and "the facts known" to him at the time, provide "the best opportunity for the unborn child to survive, unless, in his good faith medical judgment" using that method will pose "a greater risk of

the death of the pregnant woman." *See* I.C. § 18-622(3)(a)(iii).

In other words, this means that if a woman is to have an unborn child removed from her body based on the preservation of her life, having been raped, or the victim of incest requirements—when the unborn child is viable outside of her womb—the physician must remove that unborn child in a manner that provides the best opportunity for survival (e.g., vaginal delivery or cesarean delivery) and cannot remove the child using a method which will necessarily end its life (e.g., dilation and extraction, or partial-birth abortions). The exception to this is when, in the physician's "good faith medical judgment," a method that would save the unborn child's life poses a "greater risk of the death of the pregnant woman." *See* I.C. § 18-622(3)(a)(iii). This reading comports with the legislature's apparent attempt, when crafting the Total Abortion Ban, to protect the life of the unborn child *where it is possible*. And it plainly has a "core of circumstances" to which any ordinary person would unquestionably understand it applies (e.g., late term pregnancies). In addition, like the "necessary" to save the life of the mother requirement, this requirement is purely subjective and merely requires a good faith judgment call by the physician without needing to be objectively "correct."

***62** Thus, because the "best opportunity for the unborn child to survive" affirmative defense has a "core of circumstances" to which it applies, Petitioners' facial challenge here is unavailing.

d. Petitioners' argument that the Total Abortion Ban and 6-Week Ban are facially vague because they are "impossible to parse" when read together is impermissibly raised for the first time in reply.

Petitioners argue, for the first time in their reply briefs (Dkt. Nos. 49817, 49899), that the Total Abortion Ban—when read in conjunction with the 6-Week Ban—renders these laws "unconstitutionally vague" because a person of ordinary intelligence cannot discern which provisions of which laws are currently in effect and govern medical providers. As explained above, a federal preliminary injunction was issued against enforcement of the Total Abortion Ban where it allegedly conflicts with EMTALA. *See United States v. Idaho*, No. 1:22-CV-00329-BLW, —— F.Supp.3d ——, ——, 2022 WL 3692618, at *15 (D. Idaho Aug. 24, 2022). However, the preliminary injunction does not apply to the 6-Week Ban. Based on this, Petitioners raise a new vagueness argument, and maintain that it is unclear whether the 6-Week Ban is no longer "supersed[ed]" by the Total Abortion Ban such that it could be enforced criminally, or before a professional licensing board, even when EMTALA applies to bar enforcement of the Total Abortion Ban. The "supersed[es]" language relevant to the 6-Week Ban is found in the "Penalties for Violations" section of the Heartbeat Act. *See* I.C. § 18-8805(4) ("In the event both this section and [the Total Abortion Ban], are enforceable, [the Total Abortion Ban], shall supersede this section."). This argument was not raised in the original petitions and no motion to augment the authority and argument supporting them has been made.

Under Idaho Appellate Rule 32(c), a party may make a motion permitted under the Idaho Appellate Rules at any time before or after oral argument. The Idaho Appellate Rules permit a party to file a motion to "augment the authority and argument" presented in their brief in an appeal. I.A.R. 34(e)(2). However, there is no provision in our rules that addresses how a party may move to augment the authority and argument in an original action, such as the petitions before us. In such circumstances, we adopt "the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof." I.A.R. 48. When a litigant wants to add a new argument, not in their original pleading, the practice usually followed is to allow, before trial, one amendment as a matter of right within a certain time period, I.R.C.P. 15(a)(1), and if that time period has lapsed, an amendment with the written consent of the opposing party or the court's leave, I.R.C.P. 15(a)(2). "The court should freely give leave when justice so requires." *Id*.

During and after a trial, amendment may be permitted when a party objects that evidence is not within the issues raised in the pleadings, or when an issue is "tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." I.R.C.P. 15(b)(1), (2). At the trial level, "[a] party may move, at any time, even after judgment, to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." I.R.C.P. 15(b)(2). However, on appeal, the usual practice is not so forgiving. In appeals, issues omitted from the appellant's opening brief and raised for the first time in a reply brief are not considered. *Myers v. Workmen's Auto. Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004). In addition, a party is only allowed to "augment the authority and argument" presented in their brief *before* the issuance of an opinion, and upon "a showing of good cause why the material had not been included" in the prior briefing. I.A.R. 34(e)(2). When a motion to augment is granted, the Idaho Appellate Rules require us to provide "time within which any reply brief of an adverse party can be filed." *Id*.

***63** Here, before this opinion issued, Petitioners never filed a motion to augment the authority and argument in any of their original petitions to add the "impossible to parse" vagueness argument they raise for the first time in their reply briefs. Because of this, Respondents and Intervenors have not had an opportunity to respond to Petitioners' new argument, and without that opportunity, Petitioners' argument is not properly before this Court. Therefore, we decline to address it.

2. Petitioners' facial challenge to the 6-Week Ban fails because there is a core of circumstances to which the law unquestionably applies.

a. The "medical emergency" exception

Moving to the 6-Week Ban, Petitioners bring a facial challenge against its "medical emergency" exception as impermissibly vague, arguing it "force[s] a physician to guess at the meaning" of its contents and risk both professional and criminal sanctions if "he or she guesses wrong." In addition, Petitioners argue that the law imposes criminal penalties without any "scienter" because the "medical emergency" exception is objective and not based on the physician's good faith medical judgment. In other words, even if the physician, in good faith, believed an abortion fell under the "medical emergency" exception, he would still be liable under the 6-Week Ban if it was later determined his judgment was not objectively "reasonable."

The language Petitioners challenge relates to the definition of "medical emergency" under the 6-Week Ban where abortions that are, "in reasonable medical judgment," necessary "to avert" the death of the woman "or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function" are exempted from criminal (and civil) liability. *See* I.C. § 18-8804(1) ("A person may not perform an abortion on a pregnant woman when a fetal heartbeat has been detected, *except* in the case of a *medical emergency* ...." (emphasis added)). The full definition of "medical emergency" is as follows:

> "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

I.C. § 18-8801(5).

Looking first at the phrases—"neccess[ary] ... to avert [the patient's] death" and "for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function[,]"—each easily has a set of "core circumstances" to which a person of ordinary intelligence would unquestionably understand they apply. As Respondents point out, the same phrases are commonly found within many "medical emergency" definitions past and present. *See, e.g.*, I.C. § 604(9) (2005); *see also* Ala. Stat. § 26-23G-2(6); Ga. Code § 16-12-141(a)(3); N.C. Gen. Stat. § 90-21.81(5); N.D. Cent. Code Ann. § 14-02.1-02.12. Indeed, EMTALA uses language *substantially similar* to the phrases challenged here, *see* 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii) ("placing the health of the individual ... in serious jeopardy[,]" "serious impairment to bodily functions[,]" and "serious dysfunction of any bodily organ or part"), and that language in EMTALA explains to medical providers, under the current federal preliminary injunction, when the Total Abortion Ban cannot be enforced. *See also Dobbs*, 142 S. Ct. at 2243, 2284 (upholding Mississippi's abortion law—Miss. Code Ann. § 41-41-191 (2018)—that contains an exception for "medical emergenc[ies]" which tracks the language of EMTALA).

***64** Moreover, these phrases have been used in Idaho for roughly seventeen years without being challenged as impermissibly vague. *See* 2005 Idaho Sess. Laws 1318, 1320. And a physician's understanding of these phrases, during that time, was necessary, for example, when deciding whether parental consent or judicial authorization was required to perform an abortion on a pregnant unemancipated minor. *See* I.C. § 18-609A(7)(b) (directing that parental consent or judicial authorization are not required in a "medical emergency" as defined in I.C. § 18-604(9) (the same definition as the one challenged here)). For these reasons, Petitioners cannot seriously contend that for the past seventeen years, and under EMTALA, physicians—or any person of ordinary intelligence—cannot understand the "core circumstances" to which these phrases definitively apply.

Next, looking at the objective "reasonable medical judgment" requirement for judging when there is a "medical emergency"—our conclusion is no different. Although this standard is not as broad as the subjective "good faith" standard under the Total Abortion Ban, *see supra*, it is not so vague that there is no set of "core circumstances" to which it unquestionably applies. This standard simply requires the physician to exercise "reasonable medical judgment" when determining whether the medical condition of the pregnant mother necessitates

an abortion "to avert" her death or avoid a "serious risk of substantial and irreversible impairment of a major bodily function." *See* I.C. § 18-8801(5). There is nothing unusual about holding physicians to a clear standard of objective "reasonableness" when exercising medical judgment. This standard is not ambiguous. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 391, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (holding an abortion statute that imposed strict liability was impermissibly vague where it was "unclear whether the statute imports a purely subjective standard, or whether it imposes a *mixed* subjective and objective standard." (emphasis added)), *abrogated on other grounds by Dobbs*, —— U.S. ——, 142 S. Ct. 2228, 213 L.Ed.2d 545 (2022). And it provides "more than fair warning as to what conduct is expected" in order to avoid liability because "this is the same standard by which all ... medical decisions are judged under traditional theories of tort law." *See Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999) (explaining that merely because one physician would choose "to perform an emergency abortion" under certain circumstances, while others would not, does not necessarily mean the physician who performed the abortion exercised *unreasonable* medical judgment). In other words, the "reasonable medical judgment" standard under the 6-Week Ban is merely a standard for *minimum competency* that physicians are routinely expected to satisfy. *See U.S. Vuitch*, 402 U.S. 62, 72, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971) ("[W]hether a particular operation is necessary ... is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.").

Finally, the Petitioners' contention that the objective "reasonable medical judgment" standard obviates any "scienter" requirement for the 6-Week Ban is meritless. Contrary to Petitioners' position, the 6-Week Ban does not impose strict liability. Instead, to be criminally liable under the 6-Week Ban, the medical provider must "knowingly or recklessly" perform or induce an "abortion" in violation of the Fetal Heartbeat Act. I.C. § 18-8805(2). In addition, when it comes to the professional licensing penalty, I.C. § 18-3305(3), the definition of "abortion" in the Act provides a scienter requirement where it requires the medical provider to have acted "intentionally" to terminate the "clinically diagnosable pregnancy of a woman with knowledge that the termination ... will, with reasonable likelihood, cause the death of the preborn child." I.C. § 18-8801(1). For the above reasons, we conclude the "medical emergency" exception in the 6-Week Ban is not impermissibly vague because it provides fair notice of what it requires.

b. The exceptions for rape and incest

***65** Petitioners argue that the rape and incest exceptions in the 6-Week Ban are impermissibly vague because they require medical providers to "guess" about whether a given police report sufficiently alleges rape or incest as defined by law. Contrary to Petitioners' argument, these exceptions do no such thing. The challenged exceptions are within the provision of the Fetal Heartbeat Act that proscribes certain abortions, and provides in relevant part as follows:

> (1) A person may not perform an abortion on a pregnant woman when a fetal heartbeat has been detected, *except* in the case of a medical emergency*, in the case of rape* as defined in section 18-6101, Idaho Code, *or in the case of incest* as described in section 18-6601, Idaho Code. *In the case of rape or incest*:
>
> (a) If the woman is not a minor or subject to guardianship, then, prior to the performance of the abortion, the woman has *reported the act of rape or incest* to a law enforcement agency and *provided a copy of such report* to the physician who is to perform the abortion; or
>
> (b) If the woman is a minor or subject to guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has *reported the act of rape or incest* to a law enforcement agency or child protective services *and a copy of such report have been provided* to the physician who is to perform the abortion.
>
> [....]
>
> I.C. § 18-8804 (emphasis added).

A plain reading of these exceptions demonstrates the "core circumstances" to which a person of ordinary intelligence would unquestionably understand they apply. Neither exception requires a physician to "guess" whether the narrative in a police or child protective services report legally constitutes "rape" or "incest" sufficient to secure a later conviction under Idaho Code sections 18-6101 or -6601. Instead, each exception merely requires, in the "core" set of circumstances, that the woman (or her parent or guardian if she is a minor or subject to guardianship), prior to obtaining the abortion, previously reported the alleged rape or incest to the police or child protective services, and tendered a copy of that report to the medical provider. The statute does not require the physician to judge the legal sufficiency of the report. The statute only requires that the report be made. Therefore, whether a narrative in a *particular* report is so facially inadequate that no reasonable person would think its contents amount to any definition of "rape" or "incest" is at most, an "uncertaint[y] at the margin[,]" *Planned Parenthood of Indiana & Kentucky, Inc.*, 7 F.4th at 605 (alterations

added), only appropriate in an as-applied challenge. Here, Petitioners have brought a facial challenge. Thus, for the reasons stated above, the "rape" and "incest" exceptions are sufficiently explicit because there is a set of "core circumstances" to which they unquestionably apply.

3. The Civil Liability Law does not impose excessive or vague penalties in violation of the Due Process Clause.

Moving to the Civil Liability Law, Petitioners argue that it facially violates the Due Process Clause because it contains "excessive and vague penalties." Petitioners further argue that we should apply the more stringent review we afford criminal laws because the Civil Liability Law imposes statutory penalties that are "quasi-criminal" in nature. Petitioners' challenges here invoke two separate principles under the Due Process Clause—proportionality and vagueness—and for the reasons discussed below, we conclude that the Civil Liability Law violates neither.

***66** As a preliminary matter, the Civil Liability Law only allows certain private individuals to recover civil damages, statutory damages, and costs and attorney fees. *See* I.C. § 18-8807(1)(a)–(c). Unlike juvenile delinquency proceedings, *Int. of Doe*, 168 Idaho 389, ——, 483 P.3d 932, 935 (2020), and contempt proceedings, *Matter of Williams*, 120 Idaho 473, 476, 817 P.2d 139, 142 (1991), litigants pursuing a cause of action under the Civil Liability Law are only entitled to monetary relief; they cannot place a medical provider's "liberty" interest at stake through penalties that closely resemble criminal sanctions. Moreover, because abortion is not a fundamental right, the Civil Liability Law is not a "punitive" scheme to limit and infringe the exercise of a protected constitutional right. Thus, the Civil Liability Law is not "quasi-criminal" in nature, and we decline to apply our criminal standard for Petitioners' vagueness challenge to it.

Next, as to the merits of Petitioners' vagueness challenge, to the extent Petitioners argue the statutory damages remedy in the Civil Liability Law is impermissibly vague because it "gives no guidance as to how its limitless statutory damages are to be calculated[,]" Petitioners' argument misses the mark. Vagueness challenges are concerned with whether a law gives sufficient notice of what *conduct* it requires or prohibits. *See Olsen*, 117 Idaho at 716, 791 P.2d at 1295 ("This Court has held that a statute which either forbids or requires the doing of an *act* in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law." (emphasis added)). The Civil Liability Law, using the same standard as the 6-Week Ban, plainly and unambiguously sets out a standard of prohibited conduct that has a set of "core circumstances" to which a person of ordinary intelligence would unquestionably understand it applies. *See* I.C. § 18-8804. Thus, Petitioners' vagueness challenge against the Civil Liability Law is meritless.

Next, Petitioners argue that the statutory damages provision is a "penalty" or "punitive" and as such, violates Idaho's Due Process Clause because the $20,000 minimum is "wholly disproportionate" and "obviously unreasonable" when compared to the offense the law proscribes. Petitioner's "no guidance" argument appears entwined in this sentiment. To support their position, Petitioners rely on *State Farm Mutual Auto Insurance Co. v. Campbell*, where the United States Supreme Court, in dealing with *punitive damages*, set out a proportionality requirement under the Due Process Clause of the Fourteenth Amendment as forbidding "grossly excessive or arbitrary punishments on a tortfeasor." 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (dealing with the same).

Petitioner's argument here relies on a faulty premise. The $20,000 minimum statutory damages provision in the Civil Liability Law is not a "punishment" or a "penalty" like a punitive damages remedy. *See* I.C. § 18-8807(1)(b). Indeed, the Civil Liability Law does not even contain a punitive damages remedy. *See* I.C. § 18-8807(1)(a)–(c). Instead, the minimum statutory damages provision is *compensatory* in nature. Thus, we do not need to decide how the "proportionality" rule in *Campbell* operates under Idaho's Due Process Clause to reject Petitioners' challenge.

To explain, punitive and compensatory damages serve distinct purposes. "Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Campbell*, 538 U.S. at 416, 123 S.Ct. 1513. "By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution[,]" i.e., they do not *compensate* the plaintiff for a loss. *Id.* The "proportionality" requirement under *Campbell* only applies to remedies aimed at punishment, deterrence, and retribution (i.e., punitive damages)—not compensatory remedies that seek to make a plaintiff whole. *See id.* Here, the statutory damages remedy in the Civil Liability Law sets a *compensatory* baseline.

***67** Indeed, the $20,000 minimum statutory damages provision, I.C. § 18-8807(1)(b), when read in conjunction with the general "damages" provision, I.C. § 18-

8807(1)(a), is plainly aimed at, although not exclusively, those types of intangible damages that are inherently difficult to quantify (i.e., noneconomic damages that account for pain, suffering, emotional distress, etc.). The legislature's authority to enact this type of statutory remedy, notwithstanding the common law which does not provide automatic "minimums" for noneconomic damages, is well within its purview. *See* Idaho Const. Art. XXI, § 2 (providing that the legislature may alter or repeal the common law); I.C. § 73-116 (same). Through this same authority, the legislature can place a statutory cap on the amount of noneconomic damages otherwise available at common-law. *See Kirkland v. Blaine Cnty. Med. Ctr.*, 134 Idaho 464, 468, 4 P.3d 1115, 1119 (2000); *see also* I.C. § 6-1603 ("Limitation on noneconomic damages"). And if the legislature can use this authority to set a ceiling for noneconomic damages—they can certainly use it to set a floor.

Moreover, this floor is not arbitrary, as it is easy to conceive of a mother, father, sibling, or grandparent who would suffer severe emotional distress at the loss of an unborn child in violation of the Civil Liability Law. Indeed, allowing compensatory damages in the case of an unborn fetus is not unprecedented. For example, we already recognize a cause of action for the wrongful death of a viable unborn fetus under Idaho Code section 5-310. *See Volk v. Baldazo*, 103 Idaho 570, 572–74, 651 P.2d 11, 13–15 (1982). Additionally, a private cause of action, similar to the Civil Liability Law, has existed since 2011, and it allows the mother or father of an unborn child to sue a medical provider for "actual damages" related to an abortion performed in violation of the Pain-Capable Unborn Child Protection Act. *See* I.C. § 18-508 (1). As to the proper "guidelines" for discerning the upper limits of the minimum statutory damages provision, one only need turn to the many tomes on compensatory damages. *See, e.g.*, Restatement (Second) of Torts §§ 901–917 (1979) (explaining types of damages and how to calculate each). Thus, for these reasons, we conclude that the Civil Liability Law is not facially violative of the Due Process Clause. Whether an award of statutory damages to a more remote relative like an aunt or uncle violates the Idaho Constitution will have to wait for another day when an "as applied" challenge is made.

D. The Idaho Human Rights Act does not limit the legislature's ability to regulate abortion through the Total Abortion Ban and 6-Week Ban.

Petitioners contend the Idaho Human Rights Act, which prohibits certain forms of discrimination on the basis of sex, I.C. § 67-5909(1)–(11), limits the legislature's ability to regulate abortion through the Total Abortion Ban and 6-Week Ban. However, we may quickly dismiss Petitioners' argument as meritless. Not only do the Total Abortion Ban and 6-Week Ban *not* turn on the basis of sex alone, *see* Section VI.B, *supra*—no present legislature can bind a future legislature through ordinary legislation. *State v. Gallet*, 36 Idaho 178, 179, 209 P. 723, 724 (1922) (explaining that the "latest expression of the legislative intent [will] prevail" in the event of a conflict (alteration added)); *see also Fletcher v. Peck*, 6 Cranch 87, 135, 10 U.S. 87, 3 L.Ed. 162 (1810) (John Marshall, C.J.) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and ... one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted.").

Instead, the legislature "may enact any law not expressly or inferentially prohibited by the state or federal constitutions." *Standlee v. State*, 96 Idaho 849, 852, 538 P.2d 778, 781 (1975). Here, the legislature that enacted the Idaho Human Rights Act, as ordinary legislation, did not bind the future legislature that enacted the Total Abortion Ban and 6-Week Ban. To the extent there is any conflict (which we need not decide), the Total Abortion Ban and 6-Week Ban would control as the "more recent expression of legislative intent[.]" *See State v. Betterton*, 127 Idaho 562, 564, 903 P.2d 151, 153 (1995). Thus, we conclude the Total Abortion Ban and 6-Week Ban do not violate the Idaho Human Rights Act because they cannot be limited by it.

E. Petitioners' remaining facial challenges to the Civil Liability Law under the Idaho Constitution are meritless.

1. The Civil Liability Law does not violate the separation of powers doctrine enshrined in Article II, section 1.

***68** Petitioners next challenge the Civil Liability Law as violating the separation of powers doctrine enshrined in Article II, section 1, because its private cause of action "attempts to deputize private citizens to do what fifty years of precedent [under *Roe*] has reaffirmed a State itself may not—enforce a pre-viability ban on abortion." However, as we explained in our August 12 Opinion denying Petitioners' request for a preliminary injunction, the constitutional landscape of abortion has changed since *Roe* and its lineage were overruled by *Dobbs*. Petitioners'

argument here hinges on the pre-*Dobbs* reality that the Civil Liability Law appeared to be an attempt by the legislature to circumvent the executive branch's inability to enforce pre-viability abortion regulations (pre-*Dobbs*) by placing the executive power to "see that the laws are faithfully executed[,]" Idaho. Const. Art. IV, § 5, in the hands of private citizens armed with a civil cause of action. *See Sweeney*, 119 Idaho at 139, 804 P.2d at 312 (explaining the separation of powers doctrine).

Nevertheless, post-*Dobbs*, the state *can* prohibit and regulate abortions pre-viability. As explained above, neither the federal constitution, nor the Inalienable Rights Clause in the Idaho Constitution protects abortion as a "fundamental" right. Thus, Petitioners' argument here falls apart because the decision in *Dobbs*, and our decision in Section VI.A of this opinion, *supra*, remove any constitutional infirmity the Civil Liability Law might have previously contained. The Civil Liability Law is now like any other civil statutory cause of action—and does not violate the separation of powers doctrine because it in no way implicates an improper usurping or delegation of the executive branch's power to regulate abortion after *Dobbs*. *See Tucker v. State*, 162 Idaho 11, 29, 394 P.3d 54, 72 (2017).

Indeed, it is well within the power of the legislature to create civil causes of action. *Stuart*, 149 Idaho at 45, 232 P.3d at 823; *Kirkland*, 134 Idaho at 471, 4 P.3d at 1122. Here, the Civil Liability Law now creates a private cause of action against medical providers who engage in abortion related conduct that the legislature has prohibited. This is no different than the Idaho Consumer Protection Act, which creates a private cause of action for consumers against prohibited trade practices (I.C. § 48-609), the Idaho Human Rights Act, which creates a private cause of action for persons against certain forms of discrimination (I.C. § 67-5909), or the Wrongful Death statute, which provides a private cause of action for heirs or personal representatives of a person whose death was "caused by the wrongful act or neglect of another" (I.C. § 5-311). Thus, we conclude Petitioners' separation of powers challenge is meritless.

2. The Civil Liability Law does not violate the prohibition against "special" laws in Article III, section 19.

Petitioners next argue that the Civil Liability Law violates the prohibition against "special" laws set out in Article III, section 19, because it specially treats medical providers who perform prohibited abortions in an "unreasonable" or otherwise impermissible manner. The relevant provision in the Idaho Constitution is as follows: "The legislature shall not pass local or *special laws* in any of the following enumerated cases, that is to say: ... Regulating the practice of the courts of justice." Idaho Const. Art. III, § 19 (emphasis added). In 1962, "courts of justice" were replaced by constitutional amendment in favor of the current integrated system of the judicial branch under this Court. *See* 1961 Idaho Sess. Laws 1077 (ratified on Nov. 6, 1962). Thus, the same provision in Article III, section 19 applies to our current judicial system.

The "general purpose" of the "special laws" prohibition in Article III, section 19, as intended at its ratification in 1889, was to "prevent legislation bestowing favors on preferred groups or localities." *Jones*, 97 Idaho at 876, 555 P.2d at 416 (explaining that this provision was patterned after similar provisions in other state constitutions as a response to a "proliferation of special and local" laws in "post-Civil War legislatures"). The three characteristics of "special laws" are well established:

> ***69** First, a special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. It is important to note that a law is not special simply because it may have only a local application or apply only to a special class if, in fact, it does apply to all such cases and all similar localities and to all belonging to the specified class to which the law is made applicable. Second, we have found that when the Legislature pursues a legitimate interest in protecting citizens of the state in enacting a law, then it is not special. Lastly, courts must determine whether the [statute's] classification is arbitrary, capricious, or unreasonable. If a law's classification is arbitrary, capricious, or unreasonable, it is a special law. In assessing the legitimacy of a particular law, as well as whether it is arbitrary, capricious, or unreasonable, this Court has on occasion examined not just the law itself, but its legislative history.

Jones v. Lynn, 169 Idaho 545, 562, 498 P.3d 1174, 1191 (2021) (quoting *Citizens Against Range Expansion v. Idaho Fish And Game Dep't*, 153 Idaho 630, 636, 289 P.3d 32, 38 (2012) (internal citations and quotations omitted)).

To contrast, "[g]eneral laws are those laws that apply to all persons and subject matters in a like situation, and they are constitutional for purposes of Article III, § 19 of the Idaho Constitution." *Citizens Against Range Expansion*, 153 Idaho at 636, 289 P.3d at 38.

Here, the Civil Liability Law is a general law and not a "special law" because it applies to all medical providers in like situations. *See* I.C. § 18-8807(1)(a) (imposing liability on "the medical professionals" who violate the abortion prohibition in I.C. 18-8804). To illustrate, the Civil

Liability Law does not apply only to a *particular* medical provider or group of named providers. Instead, any medical provider who violates the prohibition in the Civil Liability Law is subject to liability. Petitioners protest that the Civil Liability Law creates "special" procedures because it confers standing not just on the mother and father, but also on the grandparents, aunts, uncles, and siblings of the unborn child, I.C. § 18-8807(1); it has a $20,000 minimum statutory damages provision, I.C. § 18-8807(1)(b); and the four-year statute of limitations is twice as long as the period of limitations for personal injury suits, I.C. § 18-8807(2). Yet, these provisions do not render the Civil Liability Law a "special" law because each of them applies *equally* to all medical providers. In other words, these procedures do not disproportionately affect one member of a *similarly situated class*. *See* *Citizens Against Range Expansion*, 153 Idaho at 637, 289 P.3d at 39.

Furthermore, the procedures Petitioners complain of do not have an illegitimate purpose and are not so "arbitrary, capricious, or unreasonable" as to render the Civil Liability Law a "special law" targeted against medical providers. *See* *Lynn*, 169 Idaho at 562, 498 P.3d at 1191. As explained above, the Civil Liability Law has a legitimate purpose in protecting prenatal fetal life, and in promoting maternal health and safety—and the challenged procedures here are rationally related to these purposes. First, conferring standing to grandparents and siblings is not irrational as it is easy to conceive of situations where a person would suffer an injury-in-fact from the unlawful abortion of an unborn child who stood to be their grandson, granddaughter, brother, or sister. Second, as explained above, the $20,000 minimum statutory damages provision is rationally related to these purposes because it provides compensatory damages for a loss that is inherently difficult to quantify. Third, although the general statute of limitations for personal injuries is two years, I.C. § 5-219, there is nothing "arbitrary" or "capricious" about making the statute of limitations under the Civil Liability Law four years when the "catch-all" for causes of action with no specific period of limitations is already four years. *Compare* I.C. § 18-8807(2) *with* I.C. §§ 5-201 to -224.

***70** In sum, the Civil Liability Law does not have any of the "hallmarks of special laws[,]" *Citizens Against Range Expansion*, 153 Idaho at 637, 289 P.3d at 39; thus, we conclude it does not violate Article III, section 19.

3. The Civil Liability Law does not offend any "informational privacy" right within the Idaho Constitution.

Petitioners' final argument is that the Civil Liability Law violates an implicit right to "informational privacy" under a broader "zone of privacy" protected by the Idaho Constitution. Petitioners contend that the Civil Liability Law violates this implicit right by putting the "highly personal and sensitive" medical information related to a woman's pregnancy and abortion "in public litigation against the patient's will."

Petitioners' argument here is premised on the "zone of privacy" recognized under the United States Constitution and derived from no particular amendment or language. *See* *Paul v. Davis*, 424 U.S. 693, 712–13, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405 (1976) ("While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power."). However, within that "zone of privacy," the United States Supreme Court has never recognized a right to "informational privacy." *See* *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147–59, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011) (assuming—without deciding—that there is a constitutional right to "informational privacy," the challenged governmental employment questionnaire did not violate this right), *see also* *id.* at 160, 131 S.Ct. 746 (Scalia, J., concurring in the judgment) ("A federal constitutional right to 'informational privacy' does not exist."), *id.* at 169, 131 S.Ct. 746 (Thomas, J., concurring in the judgment) (same).

Moreover, Petitioners' challenge here is under the Idaho Constitution—not the United States Constitution. And in the Idaho Constitution, there is no explicit right of "privacy." *See* Idaho Const. Art. I–XXI. Additionally, as explained above, we disavow our prior decision in *Murphy v. Pocatello Sch. Dist. No. 25*, 94 Idaho 32, 37–38, 480 P.2d 878, 883–84 (1971), to the extent it can be interpreted as recognizing a "zone of privacy" as implicitly guaranteed by the Idaho Constitution without analyzing the issue. Thus, as our starting point, it is unsettled whether the alleged right of "informational privacy" is so "deeply rooted" in Idaho's traditions and history that it could be deemed "fundamental" and implicitly protected by the Inalienable Rights Clause.

However, we merely clarify this point, and do not decide it. We recognize that our decision today settles the appropriate test for determining the existence of implicit fundamental rights under the Inalienable Rights Clause. Nonetheless, just as the burden is on the appellant to show error when we exercise appellate jurisdiction, *State v. Cofer*, 73 Idaho 181, 190, 249 P.2d 197, 202 (1952), the burden is on the petitioner to show they are entitled to relief

when we exercise original jurisdiction. And when it comes to constitutional questions, "there is always a risk of bad decisionmaking" when the briefing is "inadequate" or "unhelpful." *See Miller v. Idaho State Patrol*, 150 Idaho 856, 864–65, 252 P.3d 1274, 1282–83 (2011).

***71** Here, Petitioners made no attempt to argue the right to "informational privacy" is a "fundamental" right using either the undeveloped "ordered liberty" test from *Evans,* 123 Idaho at 581–82, 850 P.2d at 732–33, the "deeply rooted" test as articulated in *Glucksberg*, 521 U.S. at 720–21, 117 S.Ct. 2258, or any other proposed test. Indeed, Petitioners merely point to the United States Constitution, and then proclaim a "right to informational privacy" exists under the Idaho Constitution—without arguing whether that right is "fundamental" or merely a right the legislature may regulate subject to rational basis review. Thus, because Petitioners briefing is inadequate and unhelpful on this far-reaching question, we decline to decide whether the Inalienable Rights Clause implicitly protects "informational privacy" as "fundamental."

In any event, we can dispose of Petitioners' challenge on non-constitutional grounds because it is overstated and based on a faulty assumption. *State ex rel. Kempthorne v. Blaine Cnty.*, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003) ("[W]hen a case can be decided upon a ground other than a constitutional basis, the Court will not address the constitutional issue unless it is necessary for a determination of the case."). As a preliminary matter, "we recognize the serious potential for great harm when certain personal information is indiscriminately released to the public." *Nation v. State, Dept. of Correction*, 144 Idaho 177, 187, 158 P.3d 953, 963 (2007). Indeed, our common-law recognizes a cause of action for "invasion of privacy." *See Berian v. Berberian*, 168 Idaho 394, ——, 483 P.3d 937, 949 (2020) (explaining there are four categories of "invasion of privacy" including "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs[,]" and "[p]ublic disclosure of embarrassing private facts about the plaintiff").

However, contrary to Petitioners' position, nothing in the Civil Liability Law *requires* confidential or sensitive medical information be "indiscriminately released to the public" or placed in "public view." *See* I.C. § 18-8807. The Civil Liability Law does provide a cause of action that could place sensitive or confidential information of the mother into evidence, but this is no different than when a third-party's confidential or sensitive information is placed at issue in proceedings related to a medical malpractice case, child protection actions, I.C. §§ 16-1601 to -1647 ("Child Protection Act"), divorce and custody actions, I.C. §§ 32-701 to -720, or actions for guardianship of incapacitated persons, I.C. §§ 15-5-301 to -5-318. Where this does occur, the judicial system is well equipped, and has much experience, in handling confidential and sensitive information through protective orders, filings under seal, and *in camera* review. *See* I.R.C.P. 26(c); I.C.A.R. 32(i). Thus, Petitioners' claim that the Civil Liability Law "forces" women to put sensitive, personal information into "public view" is meritless. Accordingly, with this premise removed, Petitioners' claim that the Civil Liability Law violates an alleged right of "informational privacy" by putting information in the "public view" is without foundation.

VII. CONCLUSION

For the reasons set forth herein, the three petitions in Docket Nos. 49615, 49817, 49899, requesting the issuance of extraordinary writs of prohibition and declaratory judgments are DENIED and the petitions are DISMISSED WITH PREJUDICE.

Chief Justice BEVAN, and Justice MOELLER concur.

ZAHN, J., dissenting.

The framers of Idaho's Constitution promised its citizens inalienable rights, including the rights to life and safety. Since before statehood, Idaho has protected the life and health of pregnant women by permitting them to obtain an abortion to preserve their life or health. Today's decision disregards the plain language of Idaho's Constitution and fails to respect its history and traditions. I therefore respectfully dissent.

A. A pregnant woman has a fundamental right to obtain an abortion to preserve her life or health.

***72** Petitioners point to sections 1, 17, and 21 in Article I as potential textual bases for an implicit fundamental right to abortion. Passing on the constitutionality of statutory enactments is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*, 5 U.S. (1

Cranch) 137, 2 L.Ed. 60 (1803). *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993); *see also Miles v. Idaho Power Co.*, 116 Idaho 635, 640, 778 P.2d 757, 763 (1989). When we are called on to perform this duty under the Idaho Constitution, "the primary object is to determine the intent of the framers." *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019) (quoting *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006)). Thus, any implicit fundamental rights the framers intended to protect from that "broad field of police power" to "enact laws concerning the health, welfare and morals of the people[,]" must be based on the plain language of the Idaho Constitution. *Berry v. Koehler*, 84 Idaho 170, 176, 369 P.2d 1010, 1013 (1961). "Fundamental rights" in our state constitution are those that are either "expressed as a positive right" or "implicit in our State's concept of ordered liberty." *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581-82, 850 P.2d 724, 732-33 (1993).

I agree that when interpreting Idaho's Constitution to determine whether a right was implicit in Idaho's concept of ordered liberty, we cannot ignore Idaho's history and tradition. It is impossible to determine the framers' intent and whether a right is implicit in Idaho's concept of ordered liberty without considering Idaho's history and traditions.

However, because we are interpreting our state Constitution, we are not bound to the same test that the United States Supreme Court applies to interpret the federal constitution. While history and tradition are important and often controlling considerations, they should not always be the sole consideration. This Court has repeatedly recognized that Idaho's Constitution was not "frozen in time." *See J.C. Penney Co. v. Diefendorf*, 54 Idaho 374, 385, 32 P.2d 784, 795 (1934) ("It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation."); *see also McDonald v. Doust*, 11 Idaho 14, 17, 81 P. 60, 63 (1905) ("The thoughts and hopes of the people who adopted that document were centered on a future filled with the progress and development time is bringing us."); *State v. Bennion*, 112 Idaho 32, 37, 730 P.2d 952, 957 (1986) ("The [f]ramers did not intend to *literally* freeze the law precisely as it existed in 1890. To do so would yield the absurd result of affording no right to jury trial to those accused of crimes that happened not to be in statutory or common law existence at that arbitrary point in history." (alteration added)); *State v. Kouni*, 58 Idaho 493, 497, 76 P.2d 917, 921 (1938) ("The police power is broad and must be given an interpretation in keeping with changing times and conditions, which rule this court has from its inception adhered to with progressive foresight.").

Considering this history, and the inescapable reality that time brings developments that our founders could not have contemplated, we should look to Idaho's history and traditions to determine the framers' intent but not be locked into examining those rights only according to the circumstances in which they existed circa 1890. Rather, we must follow our precedent that Idaho's Constitution did not freeze rights as they existed in 1890. The deeply rooted test locks this Court into determining whether a constitutional right exists based on whether it was litigated or written about in 1890. There may well be rights that were not litigated or written about, but which the framers still intended to include within our constitution. There may also be rights that were written about in 1890, but the then-existing circumstances have since changed. The fact that a situation we confront today was not discussed circa 1890, should not prevent this Court from determining whether our Constitution speaks to that situation today. Setting Idaho's history and traditions as our guidepost when determining the framers' intent ensures we do not stray from the requirement that we interpret our constitution according to the framers' intent. Limiting our interpretation to conditions as they existed in 1890 runs the risk of reading rights out of our constitution, particularly the inalienable rights.

***73** Petitioners' argument that Idaho's constitution includes an implied right to obtain an abortion primarily focuses on Article I, sections 1 and 21. Our founders adopted Article I, section 1, without debate. Proceedings and Debates 127–28, 1589 (I. W. Hart ed., 1912). When considering section 21, a motion carried to strike the word "popular" from the title, but the content of section 21 was likewise adopted without debate. *Id.* at 392, 1636. A plain reading of sections 1 and 21 show that they are broadly written: Section 1 sets forth a non-exhaustive list of inalienable rights that are retained by the people of Idaho, and section 21 makes clear that the drafters of the constitution did not intend that the rights listed in Article I would be the *only* rights so retained.

The historical and legal backdrop against which the Idaho Constitution was adopted supports a broad interpretation of the individual rights protected by these sections. "Because many of the delegates to the Constitutional Convention

were outstanding lawyers in their day, we generally presume that they knew and acted on such prior and contemporaneous interpretations of constitutional words which they used." *Clarke*, 165 Idaho at 397, 446 P.3d at 455 (quoting *Paulson v. Minidoka Cnty. Sch. Dist. No. 331*, 93 Idaho 469, 472 n.3, 463 P.2d 935, 938 n.3 (1970)). During the era in which our constitutional convention was held, individual rights were broadly recognized and protected. For example, in 1886—just a few years before the convention—the United States Supreme Court explained:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886). The United States Supreme Court's statement that a court's "motto should be *obsta principiis*" is telling. The Latin phrase means "[w]ithstand beginnings; resist the first approaches or encroachments." *Id.*; *Obsta principiis*, Black's Law Dictionary (10th ed. 2014). In other words, the U.S. Supreme Court in *Boyd* cautioned against allowing even tiny governmental encroachments on individual rights, lest those small encroachments lead to ever larger ones. Such an encroachment could "*only* be obviated" by broadly interpreting constitutional provisions that protected individual rights. *Boyd*, 116 U.S. at 635, 6 S.Ct. 524 (italics added).

When the drafters met in the summer of 1889 to discuss the provisions they wished to include in the Idaho Constitution they would have obviously been aware of the United States Supreme Court's discussion of individual rights in *Boyd* and that it was the practice of courts to broadly construe guarantees of individual rights and liberties. Had the drafters deemed this broad construction inappropriate, they could have drafted the Idaho Constitution in a way that disclaimed it. They did not do so. Rather, they did the opposite: Article I, section 1 lists many rights retained by the people of Idaho and further provide that the enumerated rights are "among" the rights so retained. Article 1, section 21 further makes clear that the enumeration of rights in the entirety of Article 1 "*shall not* be construed to impair or deny other rights retained by the people." Idaho Const. art. I, § 21 (italics added). As they were aware of court precedent, the drafters were also aware of the mandate they set forth in section 21 by using the phrase "shall not." *See e.g.*, *Pentico v. Comm'n for Reapportionment*, 169 Idaho 840, 848, 504 P.3d 376, 384 (2022) ("Usually, the word 'shall' is mandatory."). Article I, sections 1 and 21 of the Idaho Constitution, as written, adopted the broad construction set forth in *Boyd*.

***74** The expansive retention of rights set forth in Article I, sections 1 and 21, are a limitation on the power of the state government, not simply in 1889, but today as well. *See, e.g.*, *State v. Thiel*, 158 Idaho 103, 110, 343 P.3d 1110, 1117 (2015) ("Our State Constitution is a limitation, not a grant of power, and the [l]egislature has plenary powers in all matters, except those prohibited by the Constitution." (quoting *Rich v. Williams*, 81 Idaho 311, 323, 341 P.2d 432, 439 (1959)) (alteration in original)). As the late Justice Brennan aptly explained:

> [T]here exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure of government for a free society. For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977) (hereafter "Brennan, *State Constitutions*"). *See also State v. Guzman*, 122 Idaho 981, 987, 842 P.2d 660, 666 (1992) (noting that Justice Brennan's article "helped to spark greater interest in independent state constitutional analysis").

The plain language of Article I, sections 1 and 21, the historical legal context at the time of the constitutional convention, and the framers' placement of the inalienable rights provision as the first, most prominent, provision of our constitution demonstrates that the framers intended the inalienable rights provision to be a broad retention of personal rights enjoyed by Idahoans. The provision expressly protects the rights to enjoy and defend life and liberty, pursue happiness and secure safety. The rights to both enjoy and defend life, and the right to secure safety were promised to *all* of Idaho's citizens.

Petitioners also contend that Article I, section 17 and its protections against unreasonable searches and seizures give rise to a fundamental right to bodily privacy that includes the right to obtain an abortion. While there was some debate about this section, none of it concerned a right to bodily privacy or abortion. *See* Proceedings and Debates 372, 1635–36 (I. W. Hart ed., 1912). It is true that in some instances we have determined that our Constitution provides greater protections against arrest and searches than the Fourth Amendment to the federal constitution. *See State v. Donato*, 135 Idaho 469, 471, 20 P.3d 5, 7 (2001) (explaining that Idaho's Search and Seizure Clause has provided greater protections than the Fourth Amendment based on "the uniqueness of our state, our Constitution, and our long-standing jurisprudence."); *State v. Thompson*, 114 Idaho 746, 748–51, 760 P.2d 1162, 1164–67 (1988) (explaining that Article I, section 17 foreclosed the use of "pen registers," which were otherwise lawful under the Fourth Amendment). However, I have not found evidence to support the contention that the framers intended to include a broad right to bodily privacy that would include an implicit right to obtain an abortion in section 17. The plain language of the clause limits its application to "unreasonable" searches and seizures. I find no evidence to indicate that the framers believed the criminalization of abortion constituted an unreasonable seizure of a pregnant woman or otherwise intended section 17 to create a broad right to bodily privacy. As a result, I cannot find that the framers intended the prohibition on unreasonable searches and seizures to give rise to an implicit fundamental right to obtain an abortion.

***75** Thus, the only possible sources of an implicit right to obtain an abortion are found in Article I, sections 1 and 21. In analyzing whether the right to obtain an abortion was implicit in Idaho's concept of ordered liberty, I remain mindful that our duty is to faithfully interpret the Idaho Constitution through the framers' intent. *Miles*, 116 Idaho at 640, 778 P.2d at 762. I agree that when interpreting our constitution we must avoid subjective injections of what we think "fair," "just," or "good policy" to reach a desired outcome. Relying on Idaho's history and traditions to inform our analysis of whether a fundamental right is implicit in Idaho's concept of ordered liberty ensures we do not unwittingly substitute our judgment for that of the framers.

Idaho's history and traditions demonstrate that Idaho has historically permitted pregnant women to obtain an abortion to preserve their life or health. During the territorial assembly's *first* session, less than a year after the Territory of Idaho was created in 1863, the Territorial Legislature made procuring an abortion a criminal offense:

> [E]very person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years: *Provided*, That [sic] no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.

Act of Feb. 4, 1864, ch. IV, § 42, 1863–64 Idaho Terr. Sess. Laws 443 (emphasis original) (alterations added).

Next, and only two years before the constitutional convention in 1889, the laws and statutes of Idaho were compiled, revised, and reenacted at the fourteenth territorial session. *See* R.S. §§ 6794, 6795 (1887). Notably, while many of the criminal prohibitions against many abortions remained, the revised statutes changed the language of the exception from "save" to "preserve" the life of the woman:

> **Sec. 6794.** Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take, any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the Territorial prison not less than two nor more than five years.
>
> **Sec. 6795.** Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the Territorial prison not less than one nor more than five years.

Idaho Rev. Stat. (R.S.) §§ 6794, 6795 (1887) (emphasis added). This compilation was subsequently approved by the Territorial Legislature. *See* Council [Senate] Journal Idaho Terr., 14th Sess. (Dec. 13, 1886, to Feb. 10, 1887), at 43–44, 58. Idaho's legislature repeatedly reaffirmed the criminal prohibitions in substantially the same form and always with the same exception for abortions "necessary to preserve" the woman's life. Idaho Rev. Code (R.C.) §§ 6794, 6795 (1909); Idaho Comp. Stat. (C.S.) §§ 8281, 8282 (1919); I.C. §§ 17-1810, 17-1811 (1932); I.C. §§ 18-601, 18-602 (1947).

The definition of "preserve" is undeniably broader than that of "save." The first definition for "preserve" in the Merriam-Webster online dictionary is "to keep safe from

injury, harm, or destruction." https://www.merriam-webster.com/dictionary/preserve (last accessed on December 15, 2022). It identifies the synonyms of preserve as "protect" or "maintain." *Id.* The first definition for "save" is inapplicable to the context here, but the second definition is "to rescue or deliver from danger or harm." https://www.merriam-webster.com/dictionary/save (last accessed on December 15, 2022). The plain meaning of the word "preserve" thus not only encompassed an abortion to prevent the death of the mother, but also to protect her health "from injury, harm or destruction." The majority's attempt to differentiate between the definitions of "save" and "preserve" ignores the plain language of the dictionary definitions on which it relies. Regardless of whether we look to current dictionary definitions or those from the 1800s, the definitions of both "save" and "preserve" include "to preserve from injury," "to rescue from danger," and "to keep or save from injury or destruction." Each of these definitions implicates protecting a woman from death or adverse health consequences that would injure her or destroy aspects of her health.

***76** Five of the members which enacted the criminal abortion laws in sections 6794 and 6795 of the Revised Statutes of 1887 were also delegates to the 1889 constitutional convention. Thus, the Inalienable Rights Clause was framed, at least in part, by those *same* individuals who thought abortion was largely a crime except when necessary to preserve the life of the mother. Had those individuals not intended the inalienable rights of life and safety to apply to pregnant women, they could have specifically stated as much. They made no such distinction. Idaho had always permitted abortions to save the life of the mother, and later expanded the right to include abortions to preserve her life or her health. As discussed below, Idaho's history and traditions established that these rights were implicit in Idaho's concept of ordered liberty. There was no need for the founders to discuss these points further because they were historically protected and were clearly encompassed within the inalienable rights' provisions protecting the pregnant woman's rights to life and safety.

The history and traditions related to Idaho's medical profession likewise indicates that Idaho has permitted abortions to preserve the life or health of the mother. Idaho's early medical regulations did not prohibit doctors from performing all abortions, but only from performing "criminal abortions" or "unlawful abortions." The historical medical journal Northwest Medicine, in which articles from Idaho doctors was published, discussed the difference between "criminal" and "justifiable" abortions necessary to preserve the life of the mother. Northwest Medicine Vol. V. 289–96 (Jan. to Dec. 1907). Idaho thus recognized and condoned abortions to preserve the life or health of the mother.

The manner in which Idaho's news outlets reported on abortions focused on criminal abortions and prosecutions. None appear to report on abortions performed to preserve the life of the mother, presumably because those abortions were not criminalized.

Idaho's history and traditions, as well as the plain language of its Constitution, establish that a pregnant woman's right to obtain an abortion to preserve her life or health is implicit in Idaho's concept of ordered liberty. In the time preceding and following the adoption of the Inalienable Rights Clause the framers, the territorial assembly, the state legislature, and the physicians of Idaho recognized and condoned abortions to preserve the life or health of the mother. This conclusion is further supported by the broad grant of inalienable rights to life and safety contained in Article I, section 1. The framers' intent to protect not only the life, but the health of the mother, is reflected in the grant of inalienable rights—which expressly protect both life and safety. That such abortions were implicit in Idaho's concept of ordered liberty is also reflected in the Idaho territorial legislature's, and later the Idaho state legislature's, decision to amend the language of the criminal statute's exception from "save" to "preserve" the life of the woman.

While the majority opinion takes issue with my consideration of Idaho's historical statutes in reaching this conclusion, our laws are necessarily part of Idaho's history and traditions. The majority opinion relies on them as well for that reason. Our historical statutes also reflect the framers' knowledge at the time they drafted our Constitution. Furthermore, my conclusion today is not based solely on our historical statutes, but also on the history of Idaho's medical profession and journalists' focus on reporting on criminal abortions as opposed to those performed to preserve the life of the mother.

Further, and contrary to the majority's assertion, my decision today does not elevate statutes to the status of constitutional provisions. Instead, it recognizes the explicitly granted, inalienable constitutional rights to life and safety and also looks to Idaho's history and traditions to determine whether those inalienable rights encompass a fundamental right to obtain an abortion to preserve the life or health of the mother. My decision simply acknowledges and gives effect to this history and tradition.

***77** A woman's pregnancy—and whether that pregnancy is terminated—drastically impacts her rights to both life and safety. Pregnancy and childbirth are indisputably fraught with danger. Pregnancy can cause a wide array of

medical side effects, ranging from unpleasant, to debilitating, to fatal. These side effects run the gamut from morning sickness and significant and sometimes permanent physical changes to gestational diabetes and post-partum depression, and on to preeclampsia, eclampsia, and death. As explained by the New Mexico Supreme Court:

> We also note that some physical characteristics, such as the ability to become pregnant, may have profound health consequences. For example, there is undisputed evidence in the record that carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus.

New Mexico Right to Choose/NARAL v. Johnson, 126 N.M. 788, 975 P.2d 841, 855 (1998).

Pregnancy can also drastically affect a woman's mental health. As noted by the New Mexico Supreme Court, pregnancy may aggravate a woman's pre-existing psychiatric disorders, while at the same time require her to stop "tak[ing] psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus." *New Mexico Right to Choose/NARAL*, 975 P.2d at 855. These mental health risks similarly implicate the constitutional rights of life and safety.

The life and safety of a woman's family can also be dramatically impacted by her pregnancy. The health risks and complications a woman faces during pregnancy can leave her unable to care for her existing children throughout the pregnancy. Even after childbirth, it can take months or years for a woman to fully recover—*if* she completely recovers. As discussed above, pregnancy complications can result in permanent health issues or death, both of which would leave the woman unable to care for her remaining children and would adversely affect their respective rights to life and safety. Those children have a right to be parented by their mother. And, pursuant to Article I, section 21 of the Idaho Constitution, the mother of those children has the constitutional right to parent those children and make decisions about how those children are raised, including whether she is the adult to raise them. *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957); *see also Martin v. Vincent*, 34 Idaho 432, 433, 201 P. 492, 493 (1921) ("The right of a parent to the custody, control, and society of his child is one of the highest known to the law."). A mother cannot care for, teach, and otherwise rear her children if pregnancy complications claim her life or lead to serious health consequences. Additionally, women are often caregivers for other family members, such as a disabled spouse or elderly parent. Her inability to terminate a pregnancy could cause great physical harm or death to her, creating a domino effect where she can no longer provide care to those who need her most.

I realize that this conclusion leaves unanswered questions. The most obvious of which is when is an abortion necessary to preserve the health of the mother? I do not have occasion to answer that question today because neither party has proposed a standard. Suffice it to say, however, that Idaho's history and traditions do not suggest that every illness or health concern would necessitate an abortion to preserve the health of the mother. As with other constitutional rights, the answer to this and other questions would have to be answered on a case-by-case basis, because each pregnancy presents different health issues for each woman. The majority opinion suggests that recognizing a fundamental right of this nature is fraught with uncertainty and raises many questions that must be answered. Such is the nature of constitutional interpretation. Not every constitutional right comes with a bright line test for its application. We do not decline to recognize or enforce constitutional rights because the precise contours of the right must be determined on a case-by-case basis. Rather, we recognize the right and then work to interpret and apply it to those cases that come before us. Over time, we thus define the contours of the right. Our jurisprudence interpreting and applying the prohibition against unlawful searches and seizures has evolved in such a manner and the same can be done here.

***78** I recognize that fundamental rights are, by nature, few and far between. However, the right to obtain an abortion to preserve the life or health of the mother, while not expressly written in the constitution, implicates at least two of the rights—life and safety—that are explicitly enumerated in Article I, section 1. This, coupled with the intentionally broad drafting of Article I, section 1, along with Idaho's history and traditions condoning abortions to preserve the life or health of the pregnant woman, leads me to conclude that this is one of the occasions in which we must construe an implicit right as fundamental under the Idaho Constitution because it is "implicit in Idaho's concept of ordered liberty." *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181 (quoting *Van Valkenburgh*, 135 Idaho at 126, 15 P.3d at 1134).

To be clear, the consequence of determining that there is a fundamental right to obtain an abortion to preserve the life

or health of the mother does not render the legislature incapable of legislating in this arena. "The ability of the legislature to make laws related to a fundamental right arises from the reality that, in an ordered society, few rights are absolute." *Reclaim Idaho*, 169 Idaho at 429, 497 P.3d at 183. Indeed, even *Roe* allowed for some governmental regulation of abortion. Rather, our recognition of a fundamental right affects the standard under which this Court reviews statutes that infringe upon that fundamental right.

In sum, due to the plain language of Article I, section 1 of our Constitution, Idaho's history and traditions, and the impacts that pregnancy can have on a woman's inalienable rights to life or health, the right to obtain an abortion to preserve the life or health of the mother is implicit in Idaho's concept of ordered liberty. That right is, therefore, fundamental. Thus, before the State dictates the circumstances in which a pregnant woman may exercise that right, it must show that doing so is "necessary to serve a compelling state interest, and [the statutes are] narrowly tailored to achieve that interest." *Id.*

B. Idaho's history and traditions do not indicate that a broader right to abortion was implicit in Idaho's concept of ordered liberty.

I do not find as broad a right to abortion as that advocated by Petitioners. As discussed above, the language of our constitution, as well as Idaho's history and traditions, compels my decision today. I have not found evidence to support Petitioners' arguments for why we should disregard our history, or at least afford it less weight, when analyzing whether a fundamental right to abortion is implicit in Idaho's concept of ordered liberty. First, for the reasons stated in the majority opinion, I cannot conclude that a constitutional challenge to Idaho's criminal abortion statutes prior to the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) would have been successful.

Second, I have not found sufficient evidence to support Petitioners' contention that finding a right less broad than that advanced by Petitioners "would perpetuate the disenfranchisement and discriminatory treatment of women that existed circa 1890." In support of this contention Petitioners cite *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461, 491 (2019), where the Kansas Supreme Court declared a fundamental right to abortion as implicitly protected by the inalienable rights clause in the Kansas Constitution. The Kansas Supreme Court's holding in *Hodes & Nauser*, however, is based on its own history and precedent as well as its interpretation of the Lockean "natural rights" theory embodied in Kansas's inalienable rights clause. *See Id.* at 486–491. However, there are two reasons why I do not find the Kansas Supreme Court's decision controlling when interpreting our Constitution.

***79** For one, the history of Kansas, along with its jurisprudence, is not Idaho's history or jurisprudence. Thus, while the Kansas Supreme Court concluded that Kansas's history and traditions supported finding an implied fundamental right to abortion in the Kansas constitution which apparently was unbounded, the decision in *Hodes & Nauser* did not address what *Idaho's* history and traditions are on the issue of abortion.

Additionally, I have been unable to locate historical evidence supporting the contention that the framers of Idaho's Constitutions intended to grant the same inalienable rights that the Kansas Supreme Court concluded its framers intended to grant. The Kansas Supreme Court's opinion recognized that when the Fourteenth Amendment to the federal constitution was ratified in 1868, twenty-four of thirty-seven state constitutions contained provisions guaranteeing inalienable, natural, or inherent unenumerated rights. *Id.* at 625, 6 S.Ct. 524, 440 P.3d at 472. The court noted that such provisions are often referred to as "Lockean Natural Rights Guarantees." *Id.* at 626, 6 S.Ct. 524, 440 P.3d at 472. The majority examined the writings of Locke and other political philosophers and legal writers and concluded that, "one's control over one's own person stands at the heart of the concept of liberty, one of the enumerated natural rights in section 1." *Id.* at 640-42, 778 P.2d 757, 761, 440 P.3d at 480-82. After analyzing Kansas precedents, the majority concluded that "[e]ach of these court-recognized principles acknowledging the natural-law right to control one's own body and to exercise self-determination stands firmly on the shoulders of the Lockean philosophies embraced in section 1 's natural rights, which include liberty and the pursuit of happiness." *Id.* at 643-44, 778 P.2d 757, 761, 440 P.3d at 482. The majority opinion, however, failed to address the fact that Locke explicitly condemned the destruction of life, including abortion. *See Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 740 n.19 (Iowa 2022). This may be due to something unique to Kansas' history and jurisprudence; I do not know. However, I cannot disregard this fact when analyzing whether the natural rights philosophy compels the conclusion that Idaho's framers intended to grant broad, implicit fundamental rights that included the right to obtain an abortion.

It cannot be ignored that in the case of abortion, there is a life on both sides of the equation. Petitioners have not argued that the life of the unborn should be disregarded when evaluating whether a fundamental right to abortion is implicit in Idaho's concept of ordered liberty. While the evidence and history indicate that our framers' inclusion of the Inalienable Rights Clause drew from natural rights philosophy, the historical evidence also indicates that at least one of the fathers of that philosophy explicitly condemned abortion. This Court's precedent compels me to interpret our Constitution to determine the framers' intent, rather than substituting my judgment for that of the framers. After examining the underpinnings of natural rights philosophy, I cannot conclude that the framers' reliance on that philosophy for the Inalienable Rights Clause compels the conclusion that they intended to grant implicit fundamental rights that encompassed a broad right to abortion. In light of this, I cannot conclude that Idaho's historical criminal abortion statutes perpetuated the disenfranchisement and discriminatory treatment of women.

***80** Nor can I join my dissenting colleague's conclusion that the inalienable rights articulated in Article I, Section 1 encompass a broader right to abortion for the pregnant woman. This is because his analysis fails to account for the life of the unborn. As set out in the majority's opinion, Idaho's history and traditions plainly indicate that Idahoans criminalized some abortions in order to protect the life of the unborn. It is also without question that Idaho criminalized some abortions in order to protect the life and health of the pregnant woman. These two interests predated the adoption of our Constitution and thus the founders were aware of both interests when drafting our Constitution. I have not located evidence indicating that the drafters of our constitution only intended Article I, section 1 to apply to the pregnant woman. I therefore cannot conclude that the founders intended the pregnant woman's inalienable rights of liberty, happiness and safety to encompass a fundamental right to terminate another, unborn life. As noted above, Petitioners have not argued that we should disregard the life of the unborn when interpreting our Constitution. Further, although both *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) recognized a constitutionally significant distinction between viable and nonviable pregnancies, Petitioners have not argued that we should recognize such a constitutional distinction here. As a result, and without any evidence suggesting the founders intended the inalienable rights provision to only apply to "born" Idahoans, I cannot conclude that the founders intended the inalienable rights of liberty, happiness and safety to permit a broader right to terminate a pregnancy.

C. Idaho's history and traditions disprove the contention that there is no fundamental right to abortion.

Although I cannot find a broad right to abortion in our Constitution, I cannot agree with the State's and the Intervenor's assertion that our Constitution recognizes no right to abortion, even to preserve the life and health of the pregnant woman. The State and the Intervenors point to the historical criminal statutes as evidence that the drafters of Idaho's constitution cannot have viewed the termination of a pregnancy as a fundamental right under any circumstances. There are several flaws with this logic.

First, their argument ignores the broad grant of inalienable rights protected by Article I, section 1. For reasons already discussed, the framers intended the inalienable rights clause to be a broad grant of rights to Idaho's citizens. The framers specifically included life and safety as rights possessed by Idahoans, including pregnant women.

Second, their argument ignores the plain language of the very statutes on which their argument relies, which unambiguously provided an exception to protect the life or health of the mother. When Idaho's territorial legislature amended the criminal statutes to change the language of the exception from saving the health of the mother to preserving the health of the mother, this change in language suggests the legislature intended to condone abortions in more situations than just those involving the potential death of the mother. The territorial and state legislatures recodified and amended the statutes over the years, until the United States Supreme Court announced a federal constitutional right to abortion in *Roe*. At no time did the legislature seek to change the language of the exception. We must give effect to the language as written, and the word "preserve" extends to both the life and the health of the mother.

Finally, their argument ignores Idaho's history and traditions. Idaho's history and traditions permitted and condoned abortions to preserve the life or health of the mother. Although the early prohibitions against termination of a pregnancy were in place in no small measure to protect potential prenatal life, the statutes were also intended to protect the pregnant woman. *Alcorn*, 7 Idaho at 604, 64 P. at 1019 (explaining that criminal abortion was "not only destructive of a life unborn, but

place[d] in jeopardy the life of a human being,—the pregnant woman"). The drafters of the Idaho Constitution would have been aware that the life and health of the pregnant woman were protected by the statutes. Notably, in the only Idaho criminal case to address the abortion statute, the pregnant woman died as a result of the procedure. *Id.* at 600–01, 64 P. at 1015–16. Moreover, medical professionals condoned the performance of abortions to preserve the life or health of the mother.

***81** The majority opinion points out that neither party asked us to find a right to obtain an abortion to preserve the life or health of the mother. This Court, however, is charged with interpreting our Constitution to determine what it provides. In conducting that interpretation, we are not bound to only accept the parties' interpretations, especially if they are faulty. All parties asked this Court to determine whether our constitution provides an implicit, fundamental right to abortion. Idaho's history and traditions, as well as the plain language of the Constitution itself, indicate it does, but only to preserve the life or health of the mother. That the contours of that right do not exactly match the arguments of either party does not mean our Constitution is silent on the issue. If we interpreted our constitution as containing no fundamental right to abortion whatsoever, we would read the inalienable rights clause out of our Constitution and ignore Idaho's history and traditions. If we do not recognize and give effect to the framers' intent, there is nothing to prevent a future legislature from ignoring this fundamental right and eliminating all affirmative defenses and exceptions. The parties have asked us to determine whether our Constitution provides an implicit fundamental right to abortion. This is how I would have answered that question.

D. The statutes unconstitutionally infringe upon a pregnant woman's fundamental right to obtain an abortion to preserve her life or health.

A statute which restricts fundamental rights is subject to a strict scrutiny standard of review and can only be justified if it furthers a compelling government purpose, and even then, only if no less restrictive alternative is available. *State v. Doe*, 148 Idaho 919, 935, 231 P.3d 1016, 1032 (2010), *quoting Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 2782, 57 L.Ed.2d 750 (1979). Because these statutes restrict a fundamental right, it is the State's burden to show that the Total Abortion Ban, the Fetal Heartbeat Ban, and the Civil Liability Law survive strict scrutiny. *Bradbury*, 136 Idaho at 68, 28 P.3d at 1011 ("When a statute infringes on a fundamental right ... the presumption is that the statute is invalid unless the state can demonstrate the statute is necessary to serve a compelling state interest."). Applying strict scrutiny to the challenged statutes, I conclude that the statutes are not narrowly tailored and, therefore, unconstitutionally infringe upon the fundamental right of pregnant women to obtain an abortion to preserve their life or health.

For these statutes to survive strict scrutiny, the State must first show that it has a compelling state interest in enacting the statutes. The State asserts it has a compelling state interest in protecting preborn human life at all stages of development. Petitioners do not challenge this assertion.

Nevertheless, the State must still show that each of the three laws are narrowly tailored to achieve that objective. The State has not met this burden. The laws as written protect "preborn human life" at the expense of the rights to life and safety of the woman carrying the child. These laws clearly prevent a pregnant woman from exercising her fundamental right to obtain an abortion to preserve her life or health. Though it is possible for the State to regulate fundamental rights, it—not Petitioners—has the burden to prove that a law is narrowly tailored to achieve that interest.

First, the Total Abortion Ban is not narrowly tailored to achieve the State's compelling interest. The Total Abortion Ban effectively prevents pregnant women from exercising their fundamental right to preserve their health, unless they are in danger of death. As the State acknowledges in its briefing, the Total Abortion Ban prohibits the termination of a pregnancy in Idaho "*except in the rarest circumstances*[.]" (Italics in original.) Under the Total Abortion Ban, a physician is unable to terminate a pregnancy in order to prevent damage to a woman's health, no matter how extensive that damage may be. A physician may only terminate a pregnancy if he or she determines that an abortion is "necessary" to prevent the pregnant woman's death (or if the pregnancy was a result of rape or incest, if the woman supplies the physician with a copy of the law enforcement report). A pregnant woman may not terminate her pregnancy for any other reason, including (as acknowledged by counsel for the State at oral argument) to preserve her own health, regardless of how damaging or long-lasting the health consequences of her pregnancy may be. The Total Abortion Ban offers a pregnant woman little choice as to whether she is willing to endure the immeasurable risks of pregnancy and childbirth; it simply requires her to do so unless her life is in danger.

***82** Maternal health concerns about bringing a child to term clearly cover more than just conditions resulting in the death of the mother. Severe, long-term health risks to the

mother are just that: severe. As the United States District Court for the District of Idaho recently explained:

> 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 when the stabilizing treatment is an abortion, offering that care is a crime under Idaho Code § 18-622 [the Total Abortion Ban]—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 changes, and at least two years in prison [and possible civil liability under the Civil Liability Law]. 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. ... And the physician cannot enjoy the benefit of this [good faith medical judgment] defense if she performed the abortion merely to prevent serious harm to the patient, rather than save her life.

United States v. Idaho, No. 1:22-cv-00329-BLW, ——F.Supp3d ——, ——, 2022 WL 3692618, at *1 (D. Idaho Aug. 24, 2022).

Additionally, the Total Abortion Ban fails to protect pregnant women's inalienable right to life. Although it purports to allow the termination of pregnancy to save the life of the mother, the statute explicitly excludes any scenario in which the life of the mother is in jeopardy due to her mental illness. I.C. § 6-222(3)(a)(ii). If the pregnant woman has a serious mental health condition, such as bipolar disorder or schizophrenia, and takes medications which are contraindicated for pregnancy, the Total Abortion Ban forces her to either take those medications and deal with the impacts the medication will have on the unborn or stop taking potentially life-saving medications and hope for the best.

Furthermore, the severe penalties for doctors who violate the Total Abortion Ban—even those to whom the affirmative defenses apply—ensure that those doctors must delay life-saving medical care to seek legal advice prior to performing an abortion. Thus, in practice, decisions about life-saving medical care will ultimately be made by lawyers rather than medical professionals. Moreover, the Total Abortion Ban criminalizes all abortions, exposing doctors to the fraught circumstance of providing life-saving care permitted under the statute and then having to spend the time and money before a medical board and jury to defend their good faith medical judgment in order to retain their livelihood and their personal liberty. This will undoubtedly chill the medical provider's exercise of independent, good faith medical judgment. A pregnant woman's right to obtain an abortion to preserve her life or health necessarily includes the right to consult with a medical provider and obtain medical care to preserve her life or health.

***83** Similarly, the Fetal Heartbeat Ban and the Civil Liability Law also unconstitutionally infringe upon a pregnant woman's fundamental right to obtain an abortion to preserve her life or health because its restrictions are not narrowly tailored. At first blush, the Fetal Heartbeat Ban and the Civil Liability Law seemingly protect the health of Idaho mothers, at least more so than the Total Abortion Ban. However, the legislature limits the situations in which a pregnant woman may obtain an abortion to preserve her health. If the pregnant woman's health condition does not meet the legislature's requirements, it does not matter how serious the potential health complications are, she cannot obtain an abortion to preserve her health. Additionally, as with the Total Abortion Ban, this exception would force a doctor faced with a patient who has potentially life-threatening injuries as the result of a pregnancy to either risk criminal liability or withhold much-needed medical care. Again, these severe penalties ensure that doctors must seek legal advice prior to terminating a pregnancy, which means it is likely that decisions about life-saving or life-altering medical care will not be made by a highly-trained medical provider in conjunction with the pregnant woman, but instead by lawyers.

The State has not attempted to explain how the statutes are narrowly tailored such that its alleged compelling interest in protecting potential prenatal life may be achieved without putting the lives and health of Idaho women at significant risk. Moreover, the State has submitted no evidence to support the restrictions imposed on the health conditions for which a pregnant woman may obtain an

abortion to preserve her health. Instead, the State's briefing is devoid of any acknowledgement that pregnancy can adversely affect the lives and health of women. Though the State relies on *Dobbs* as support for its interest in protecting human life, the State blatantly ignores some of the other interests that *Dobbs* recognized, which included the protection of maternal health and safety and the preservation of the integrity of the medical profession. *Dobbs v. Jackson Women's Health Organization*, —— U.S. ——, 142 S.Ct. 2228, 2284, 213 L.Ed.2d 545 (2022). The State's reluctance to address these interests actively works *against* its stated interest in protecting the mother's life. Without any evidence to establish that the restrictions are narrowly tailored, the restrictions placed on a pregnant woman's fundamental right cannot withstand strict scrutiny.

The State has not met its burden to demonstrate that the Civil Liability Law, the Total Abortion Ban, and the Fetal Heartbeat Ban are narrowly tailored to achieve its stated interest in protecting human life. As a result, I would hold that these laws unconstitutionally infringe upon a pregnant woman's fundamental right to obtain an abortion to preserve her life or health.

To be clear, such a conclusion would not prevent the legislature from regulating abortion. The legislature may regulate abortion within the confines of the Idaho Constitution. However, if the legislature wishes to regulate a pregnant woman's fundamental right to obtain an abortion to preserve her life or health, then its regulation must withstand strict scrutiny. I do not envy the pregnant women faced with the decision of whether to terminate a pregnancy when their lives or health are in danger. I recognize that making such a decision is a heavy burden to bear, fraught with personal, moral, and religious implications. However, as the ones who will be impacted the most, regardless of their ultimate choice, pregnant women are entitled to make their own choices about their lives and health. I would find that under the broad retention of rights the drafters set forth in Article I, section 1 and Idaho's history and traditions, the right to obtain an abortion to preserve one's life or health is a fundamental right under the Idaho Constitution. Thus, while the decision whether to terminate a pregnancy is of profound magnitude, it is a decision that is constitutionally left to the pregnant woman and her medical provider, not the legislature or lawyers.

I do not reach this decision lightly. While the termination of a pregnancy is a health care procedure, it is *sui generis* in that there is a potential life on the other side of the equation. In this way, the termination of a pregnancy is unique from other medical procedures. I recognize that proponents on both sides of this topic hold their views on the subject deeply and fervently. *See Dobbs*, 142 S.Ct. at 2240. However, "[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1813)." *Miles*, 116 Idaho at 640, 778 P.2d at 762. If my view were to prevail, the State could pass a statute regulating abortions in Idaho which passes constitutional muster. But it has not done so with respect to the three statutes we have been called upon to review today. Accordingly, as is our duty and responsibility, I would declare the Civil Liability Law, the Total Abortion Ban, and the Fetal Heartbeat Ban unconstitutional under the Idaho Constitution. For my stated reasons, I respectfully dissent from the majority's decision.

Justice STEGNER concurs in the dissent.

STEGNER, J., dissenting.

***84** I concur in Justice Zahn's conclusion that the inalienable rights of a pregnant woman to life and safety render the right to abortion to protect those rights fundamental under the Idaho Constitution. However, I write separately because I view Idaho's constitution as providing broader fundamental rights to Idaho's women. I would go further and hold that Idaho women have a fundamental right to obtain an abortion because pregnancy—and whether that pregnancy may be terminated—has a profound effect on pregnant women's inalienable right to liberty, as well as their rights to life and safety.

The decision the majority hands down today is, in my view, simply wrong. Today's decision strips Idaho's women of their most basic rights, which in Idaho's constitution, in contrast with the federal constitution, explicitly include life, safety, liberty, and happiness. These rights are unequivocally protected by Article I, section 1 of the Idaho Constitution—or rather, those rights *were* protected by Idaho's constitution. The decision the majority has issued today effectively reads these rights out of Idaho's constitution. It nullifies the constitutional provision our forefathers saw fit to place first in our constitution, in a place of obvious primacy and importance. The men who drafted our constitution cannot have intended their chosen words to mean nothing, and yet, that is the meaning afforded them today. I cannot support an interpretation that

renders Article I, section 1 a nullity. Instead, I would hold that Article I, section 1 of the Idaho Constitution protects the fundamental right of a woman in Idaho to terminate a pregnancy. Accordingly, I respectfully dissent.

In reviewing the constitutionality of the challenged statutes, this Court's duty is to interpret the Idaho Constitution such that the drafters' intent is brought to life. As with statutory interpretation, this begins with an analysis of the plain language of the constitution: "The fundamental object in construing constitutional provisions is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters." *Sweeney v. Otter*, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990).

Article I, section 1 of the Idaho Constitution protects Idahoans' inalienable rights. The language is simple and forthright: "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." Additionally, section 21 of Article I explicitly states that "[t]his enumeration of rights *shall not* be construed to impair or deny other rights retained by the people." Idaho Const. art. I, § 21 (italics added). Read together, it is clear that, by the plain language of sections 1 and 21, the drafters of the Idaho Constitution intended Article I, which protects the rights of Idahoans from intrusion by their government, to be read broadly. The drafters made abundantly clear that the rights they listed were not the only individual rights to be constitutionally protected. They explicitly adopted the Idaho Constitution to "secure" the "blessings" of "freedom" for Idahoans. Idaho Const. Preamble ("We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution."). While the Idaho Constitution venerates our freedom, today's decision makes that promise a hollow one.

The right to terminate a pregnancy, while not expressly listed in our constitution, implicates no fewer than four of the five rights that the drafters listed in Article I, section 1. Article I, section 1 expressly protects Idahoans' rights to life, liberty, safety, and happiness. All of these expressed rights are significantly impacted by issues surrounding a pregnant woman's health and freedom to choose her path forward. In my view, this provides more than ample support to conclude that the right to terminate a pregnancy is "implicit in Idaho's concept of ordered liberty" and is, therefore, a fundamental right protected by the Idaho Constitution. *Reclaim Idaho v. Denney*, 169 Idaho 406, 427, 497 P.3d 160, 181 (2021).

***85** Whether a woman may choose to become pregnant or remain pregnant significantly affects her right to liberty. This Court has recognized that Idahoans are entitled to some level of personal autonomy. For example, as Petitioners point out, "the right to wear one's hair in a manner of his choice" is protected by sections 1 and 21 of Article I of the Idaho Constitution. *Murphy v. Pocatello School Dist. No. 25*, 94 Idaho 32, 38, 480 P.2d 878, 884 (1971). The right in *Murphy* was described by this Court as stemming from a right to privacy. *Id.* at 37–38, 480 P.2d at 883–84. As thoroughly explained by Justice Zahn, a pregnancy can and does wreak havoc on a woman's body and mind. The right to liberty protects a pregnant woman's personal autonomy and right to safety. By its plain language, our constitution affords a woman the freedom of agency over her body and her life. It recognizes that in a matter of profound importance to a woman that she, not Idaho's government, has the inalienable right to make that decision.

The right to terminate a pregnancy is substantially more important than other rights this Court has previously recognized under the right to liberty as set out in Article I, section 1. For example, this Court has held that "[t]he right to follow a recognized and useful occupation is a right protected by the constitutional guaranty of liberty" pursuant to sections 1 and 13 of Article I of the Idaho Constitution. *Berry v. Summers*, 76 Idaho 446, 451, 283 P.2d 1093, 1095 (1955). Given the effects of pregnancy on a woman's physical and psychological well-being and life, the right to terminate a pregnancy has more bearing on a woman's liberty than either the "right of personal taste" protected in *Murphy*, or the "right to follow a recognized and useful occupation" protected in *Berry*. Rather than grapple with the holding in *Murphy,* this inconvenient precedent that stands in the way of its decision, the majority simply "disavows" it. The fact that these rights are protected by Idaho's constitutional guarantee of liberty under Article I, section 1 further supports Petitioners' contention that the right to terminate a pregnancy is a liberty interest protected by our constitution.

I acknowledge that "liberty" as used in Article I, section 1 does not grant individuals unlimited freedom to live their lives outside the confines and laws of society. For example, it cannot be said that the right to liberty spelled out in Article I, section 1 protects the freedom to disobey a posted speed limit whenever one chooses. However, I believe the right to liberty cannot be so easily read out of the constitution. Idaho's constitution protects individual freedoms.

Only when an individual can make her own choices regarding the ultimate trajectory of her life is her right to liberty realized. John Locke described the "necessity of pursuing true happiness" as the "foundation of liberty." John Locke, An Essay Concerning Human Understanding 171 (27th ed., T. Tegg and Son, 1836) (1689). As Locke explained, "the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness; so the care of ourselves, that we mistake not imaginary for real happiness, is the necessary foundation of our liberty." *Id.* In other words, individual liberty is contingent upon the ability to make a choice for oneself. The choice to bear a child—or not—is life-altering in a way that very few decisions are. That choice profoundly implicates a woman's life and decisions that go to the very core of who she is as a person. To categorically rob her of that choice is to take away her most basic rights to life, liberty, safety, and the pursuit of happiness.

Where precisely the guideposts are that govern the right to liberty is not a question before this Court, but I am convinced the right to terminate a pregnancy falls squarely within them. Out of the four inalienable rights enumerated in Article I, section 1 other than liberty, the right to abortion implicates at least three. Those rights—life, safety, and happiness—must be read in unison with the right to liberty: When interpreting our constitution, we must "read[ ] the words as written" and "give effect 'to all the words ... so that none will be void, superfluous, or redundant.' " *Sweeney*, 119 Idaho at 139, 804 P.2d at 312; *State v. Pizzuto*, —— Idaho ——, ——, 518 P.3d 796, 807 (2022) (quoting *State v. Burke*, 166 Idaho 621, 623, 462 P.3d 599, 601 (2020)). When, as here, an Idahoan's rights to life, safety, and happiness are so inextricably linked to the claimed fundamental right, the plain language of Article I, section 1 protects that person's liberty to decide whether to place those other rights in jeopardy. To allow the government unfettered power to make that choice effectively nullifies not only the individual right to liberty, but also her rights to life, safety, and happiness. Thus, when the tension exists between a woman's freedom to choose and the government's ability to restrict that freedom to a nullity, the woman's freedom, can and should, prevail unless the State can demonstrate a compelling need to do so that is narrowly tailored to effectuate its concerns.

***86** This is more than simply "the freedom to do whatever one wants." Rather, it is the liberty to decide how to exercise one's own inalienable rights, and even whether to exercise those rights at all. A pregnant woman who chooses to bear a child to term is also at liberty to make that decision, even though pregnancy and childbirth place her rights to life, safety, and happiness at risk. Reading all four rights together, the Idaho Constitution does not simply afford Idahoans with the right to a life; rather, our constitution allows Idahoans to live a life worth living, and the liberty to decide what kind of life that is for themselves. Giving the legislature preeminence over this right is precisely what the founders rejected in Article 1, section 1. Requiring a pregnant woman to bear these substantial medical risks and paramount personal and familial concerns without her consent strips away her constitutionally protected liberty and forces her to live the life someone else has chosen for her.

It is clear to me that the constitutional rights of life, liberty, safety, and happiness, taken together, demonstrate that the right to terminate a pregnancy "is implicit in Idaho's concept of ordered liberty." *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181. Accordingly, I would conclude that the right to terminate a pregnancy is a woman's fundamental right pursuant to Article I, section 1 of the Idaho Constitution.

The majority circumvents this conclusion by adopting—for the first time—the federal "deeply rooted in history and tradition" test and casually "disavowing" constitutional precedent set forth by this Court over fifty years ago in *Murphy*. In doing so, the majority disregards the Idaho Constitution and this Court's long-standing case law.

I disagree with the majority's adoption of the federal "deeply rooted in history and tradition" test. This Court is under no obligation to follow federal precedent when it comes to interpreting our own state constitution. "Generally, the federal framework is appropriate for analysis of state constitutional questions unless the state constitution, the unique nature of the state, or Idaho precedent clearly indicates that a different analysis applies." *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 383, 299 P.3d 186, 190 (2013). "However, it is clear that the state constitution sometimes provides greater protection than the federal constitution." *Id.* "[W]hen interpreting the Idaho Constitution, this Court will use federal rules and methodology unless clear precedent or circumstances unique to the state of Idaho or its constitution indicates that Idaho's constitution provides greater protection than the analogous federal provision." *Id.* at 384, 299 P.3d at 191.

In my view, this case presents a clear instance in which we should interpret our state constitution in its own right and should "not 'blindly apply United States Supreme Court interpretation and methodology' when interpreting the state constitution." *Id.* (quoting *State v. Newman*, 108 Idaho 5, 11 n. 6, 696 P.2d 856, 862 n. 6 (1985)). There is simply no "analogous federal provision" to Article I, section 1 of Idaho's constitution. *Dobbs* concluded that the

federal right to due process under "the Fourteenth Amendment does not protect the right to an abortion." *Dobbs v. Jackson Women's Health Organization*, —— U.S. ——, 142 S.Ct. 2228, 2248, 213 L.Ed.2d 545 (2022). The analogous provision under our constitution to the Fourteenth Amendment is Article I, section 13, not Article I, section 1. *Compare* U.S. Const. amend. XIV ("No State shall ... deprive any person of life, liberty, or property, without due process of law[.]") *with* Idaho Const. art. I, § 13 ("No person shall ... be deprived of life, liberty or property without due process of law."). Article I, section 1 is not a guarantee of due process, nor is it a duplication of section 13. Rather, section 1 boldly sets forth Idahoans' inalienable rights, some of which are not included in the due process provision, such as "pursuing happiness and securing safety." Thus, our interpretation of Article I, section 1 should not track the United States Supreme Court's interpretation of the Fourteenth Amendment because Article 1, section 1 of Idaho's constitution is unequivocally more expansive than the Fourteenth Amendment. Sadly, today's decision effectively invalidates Article 1, section 1, the provision Idaho's drafters chose to place first in Idaho's constitution.

***87** Moreover, this Court has already set forth the test regarding whether a right is fundamental under the Idaho Constitution: "This Court has *consistently recognized* that 'a right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty.' " *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181 (quoting *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000)) (italics added); *see also Idaho Sch. For Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581–82, 850 P.2d 724, 732–33 (1993); *Simpson v. Cenarrusa*, 130 Idaho 609, 615, 944 P.2d 1372, 1378 (1997)). Never before today has this Court adopted the "deeply rooted in history and tradition" test, even though we have had ample opportunities to do so. In my view, this was not a mistake by prior members of this Court—I do not think this Court blithely sets down controlling precedent, particularly where our constitution is concerned. As I see it, the correct test to determine whether an implicit right is fundamental remains whether that right "is implicit in Idaho's concept of ordered liberty." *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181.

I further disagree with the majority's decision to disavow *Murphy*—a case that is over fifty years old and predates *Roe v. Wade*—in the manner it does. I fully recognize that there are cases in which this Court must overrule or abrogate prior decisions. However, those cases mandate that this Court undertake such a task only when necessary and only after a carefully reasoned explanation as to why we must do so. *See, e.g.*, *Durst v. Idaho Comm'n for Reapportionment*, 169 Idaho 863, 870–72, 505 P.3d 324, 331– 33 (2022) (disavowing certain components of two prior decisions only after extensive analysis). To do otherwise does nothing to explain to the public what was erroneous about the prior decision. At best, this leaves the public with an uninformed view of the law. At worst, this leaves the public with the impression that binding precedent is simply disregarded when it does not support the majority's conclusion, undermining confidence in our judicial system. Either way, in my view, it is improper for this Court to disavow *Murphy* without analysis.

Additionally, I disagree with my dissenting colleague's view that the personal views of John Locke regarding abortion were adopted into Idaho's constitution. While it is true that John Locke's writings were of great importance to both the drafters of our nation's Declaration of Independence as well as the drafters of Idaho's constitution, I am unconvinced that the drafters intended to implicitly adopt every one of Locke's personal views. Article I, section 1 was adopted without debate at the constitutional convention, and the plain language of Article I, section 1 simply states that life, liberty, property, happiness, and safety are inalienable rights. Nowhere in Locke's writings do those five rights appear simultaneously; thus, the drafters could not have simply copied down Locke's ideas as their own. Rather, they must have given conscious thought as to the individual rights they wished to include in our state constitution. There is no basis—textual, historical, or otherwise—that leads me to believe the drafters intended the inalienable right to liberty to somehow vanish once one became pregnant. Had the drafters intended to adopt Locke's views on abortion as part of our constitution, they could have done so. The drafters chose the language that they chose, language that explicitly protected the individual rights to life, liberty, safety, and happiness—not language that prohibited abortion. They did so for a reason. They wanted to emphasize that, in Idaho, individuals and their rights are preeminent and take primacy ahead of their government.

***88** I recognize that my conclusion that a right to abortion is fundamental under the Idaho Constitution's protection of individual liberty may seem surprising in light of the United States Supreme Court's recent decision in *Dobbs*. However, as I have explained, this Court is under no obligation to follow federal precedent when it comes to interpreting our state constitution. Additionally, although *Dobbs* garnered national attention, it should be noted that it is the outlier because the vast majority of other state appellate courts that have considered this question have determined that their respective state constitutions provide an implicit fundamental right to terminate a pregnancy.[1]

***89** As for Idaho, there is simply no "analogous federal provision" to Article I, section 1 of Idaho's constitution. Counter to the majority in *Roe v. Wade*, which concluded that the right to liberty set forth in the Fourteenth Amendment encompassed the right to abortion, the majority in *Dobbs* concluded that the federal right to due process under "the Fourteenth Amendment does not protect the right to an abortion." *Compare Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (explaining that the "right of privacy [that is] founded in the Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy") *with Dobbs*, 142 S.Ct. at 2248 ("[T]he clear answer is that the Fourteenth Amendment does not protect the right to abortion.") (footnote omitted). However, as explained above, the analogous provision under our constitution to the Fourteenth Amendment is Article I, section 13, not Article I, section 1. As such, *Dobbs* has no bearing on whether a right to abortion exists under the Idaho Constitution.

Furthermore, unlike the Idaho Constitution, the federal constitution does not begin with a recitation of any rights enjoyed by the people. Rather, it begins its Article I by creating the Legislative Department. Article II then explains the creation of the Executive Department, and Article III addresses the creation of the Judicial Department. The federal constitution went into effect March 9, 1789. It was not until December 15, 1791, that the federal constitution was amended to include the Bill of Rights—and even then, the Bill of Rights did not set forth inalienable rights as does our constitution. Idaho's constitution reverses this order and puts its "Declaration of Rights" as Article I. In other words, the drafters chose to place the "Inalienable rights of man" as its first, and presumably foremost, provision of the Idaho Constitution.

Additionally, at the time of Idaho's constitutional convention, the federal Bill of Rights applied only to the federal government. The first inklings of the United States Supreme Court incorporating any of the Bill of Rights to the States did not appear until 1897 and "the rest of the specific restraints [against state action] was slow in coming." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 493 (1977) (hereafter "Brennan, *State Constitutions*") (citing *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)). Thus, had Idaho's drafters intended to craft a state constitution identical to the federal constitution, they could have copied the federal Bill of Rights verbatim. They did not do so. Instead, knowing that the federal constitution did not have an analogous provision, the drafters chose not only to adopt the inalienable rights provision, but to put that provision first.[2]

I appreciate the majority's reluctance to deem an unlisted right fundamental. Judicially editing the constitution we are sworn to uphold is a grave dereliction of duty. However, where, as here, the drafters have made clear their intent that Idahoans have the inalienable rights to life, liberty, safety, and the pursuit of happiness, this is not an exercise in editing. Rather, it is simply an act of according the actual words the drafters chose to use the weight they are due. The plain language of the Idaho Constitution—inalienable rights, originally formulated by John Locke, chosen by the drafters, and ratified by the people—demand that they be given meaning. Unfortunately, they have been given no meaning by today's majority decision.

***90** The majority skirts the plain language in Article I, section 1 by pointing out that abortion was criminally prohibited in Idaho at the time the constitution was drafted. While I do not dispute this fact, allowing a territorial statute to dictate our interpretation in the way chosen by the majority is improper. *State v. Clarke*, 165 Idaho 393, 397, 446 P.3d 451, 455 (2019) ("[P]reexisting statutes and the common law may be used to help inform our interpretation of the Idaho Constitution, *but they are not the embodiment of, nor are they incorporated within, the Constitution*. To hold otherwise would elevate statutes and the common law that predate the Constitution's adoption to constitutional status." (Italics added)). The majority's focus on the criminal prohibitions effectively allow territorial statutes—which were not ratified by the people of Idaho—to override the plain language of the constitution.

I recognize that the constitution was not adopted in a vacuum and that the drafters were likely aware that abortion was criminally prohibited by territorial statute (absent the preservation of the woman's life being implicated). However, that the drafters did not explicitly disclaim the statutes does not mean they approved of them in a constitutional sense. The purpose of the constitutional convention was to draft a constitution, not to review existing territorial statutes one by one and determine whether those statutes should remain in effect once Idaho attained statehood.

Additionally, as deftly elucidated by Justice Zahn's dissent, the statutes at the time made clear that the founders were amply aware that the prohibition against abortion had to yield to the life and health of the prospective mother. The majority ignores this nuance and effectively grants a future legislature free reign to attempt to impose a ban on abortion even more restrictive than the territorial statutes.[3] Thus, the majority not only elevates a territorial statute to a status superior to that of our constitution, but it also does

so with *only a portion of that statute*—the portion that ignores a pregnant woman's life and health.

Further, the inalienable rights protected by Article I, section 1 are "natural rights," meaning that they are rights "that [are] conceived as part of natural law and that [are] therefore thought to exist independently of rights created by government or society." *Right: Natural Right*, Black's Law Dictionary (10th ed. 2014). That the territorial legislatures sought to curtail rather than permit the termination of a pregnancy has little bearing on whether such a right is *inalienable* because natural rights are not bestowed by the government. They are innate within the citizenry and stand as a bulwark against the government's intrusion. They are, in the words of our constitution, inalienable. As the Supreme Court of Kansas recently explained:

> ***91** William Blackstone in his Commentaries identified the private rights to life, liberty, and property as the three "absolute" rights—so called because they "appertain[ed] and belong[ed] to particular men, merely as individuals," not "to them as members of society [or] standing in various relations to each other"—that is, not dependent upon the will of the government. 1 Blackstone, Commentaries on the Laws of England *123, *129-38 (1765). American courts reaffirmed these observations in applying the common law in this country. *See, e.g.*, *State v. Moore*, 42 N.J.L. 208, 13 Vroom 208 (1880) (quoting 1 Blackstone, at *134: "[T]he law ... regards, asserts and preserves the personal liberty of individuals.").

Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 440 P.3d 461, 481 (2019). Natural rights exist independent of, and oftentimes in spite of, government interference. *See, e.g.*, Thomas Paine, Rights of Man 5, 30 (Paul Negri & Ronald Herder eds., Dover Publ'ns 1999) (1791) ("Man did not enter into society to become *worse* than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights." (Italics in original)).

If the majority is insistent in looking beyond the words of the constitution for the drafters' intent, it should not stop at the territorial statutes. Both "preexisting statutes *and the common law* may be used to help inform our interpretation of the Idaho Constitution[.]" *Clarke*, 165 Idaho at 397, 446 P.3d at 455 (italics added). While abortion was prohibited by statute in the Idaho Territory prior to the drafting of our constitution (absent certain, limited exceptions), it was permitted at common law prior to quickening. *State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901). Additionally, just after the constitutional convention in Idaho, the United States Supreme Court explained that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891). Of course, like preexisting statutes, the common law is "not the embodiment of, nor [is it] incorporated within, the Constitution." *Clarke*, 165 Idaho at 397, 446 P.3d at 455. However, it is noteworthy that preexisting statutes and the common law contradict each other in the realm of abortion. Given this contradiction, it is especially inappropriate for the majority to allow the territorial statute to trump the plain language of the constitution. I decline to allow pre-statehood statutes that were never constitutionally challenged to constrain the interpretation of the Idaho's enunciation of inalienable rights which are relegated to history in today's majority opinion.

Further, as noted by Justice Zahn in her dissent, the historical and legal backdrop against which the Idaho Constitution was adopted supports a broad interpretation of the individual rights protected by the plain language of Article I, as does this Court's early interpretations of Idaho's constitution. *See, e.g.*, *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *McDonald v. Doust*, 11 Idaho 14, 17, 81 P. 60, 63 (1905); *J.C. Penney Co. v. Diefendorf*, 54 Idaho 374, 385, 32 P.2d 784, 795 (1934); *State v. Kouni*, 58 Idaho 493, 497, 76 P.2d 917, 921 (1938). This historical context, coupled with the broad manner in which Article I, sections 1 and 21 are written, make it clear that the drafters of the Idaho Constitution intended the inalienable rights provisions to be a broad retention of rights enjoyed by Idahoans—rights which may evolve and strengthen over time, but may never be stripped away.

***92** While today's decision has an immediate effect on Idaho women who may become pregnant, the ultimate ramifications are much more pernicious. Every Idahoan—whether they can become pregnant or not—is affected by the majority's decision to read Article I, section 1 out of the Idaho Constitution. If the personal autonomy to decide one of life's biggest decisions—whether to bear a child—is not protected by our inalienable rights to life, liberty, safety, and the pursuit of happiness, what is?

The majority attempts to placate Idahoans by offering them what it proposes to be a solution: Simply amend the Idaho Constitution to protect your rights. In my view, such an amendment would be redundant. The constitution already protects—or rather, did protect—Idahoans' lives, liberty, safety, and pursuits of happiness. Constitutional provisions are supposed to triumph over statutes, not the other way around. Idahoans should not have to amend their constitution to force this Court to recognize the individual

rights already protected by the Idaho Constitution.

For the reasons set forth above, I would hold that a woman's right to terminate a pregnancy is fundamental under Idaho's constitution. The drafters' intent and the language they used has not been realized today. The Idaho Constitution was adopted to govern Idaho for years to come, not to stop the clock in 1889. *See* Brennan, *State Constitutions* at 495 ("[T]he genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America."). And yet, that is what the majority decision accomplishes today: Idahoans are thrust backward in time, forced to live their twenty-first century lives by nineteenth century standards and mores. Despite the great strides for equality women have made in the decades since the constitutional convention, they are once again relegated to their traditional (and outdated) roles as only child-bearers and mothers. *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412, 420, 28 S.Ct. 324, 52 L.Ed. 551 (1908) (noting the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil"); *see also Hoyt v. Florida*, 368 U.S. 57, 61–62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961) ("Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life."). The plain language of the Idaho Constitution should—and, in my view, does—prevent this from occurring. Pregnant women, like men, should be protected by their inalienable rights to life, liberty, safety, and the pursuit of happiness set out in Article I, section 1.

To be clear, the result of holding that there is a fundamental right to terminate a pregnancy is not—contrary to the majority's view of my analysis—that the legislature may *never* regulate abortion. Nor does my interpretation of Idaho's constitution fail to account for the potential life at stake, contrary to my dissenting colleague's view. Our well-established strict scrutiny standard sufficiently accounts for both of these concerns: The legislature may still regulate a fundamental right, so long as that regulation withstands strict scrutiny. "Strict scrutiny requires that the government action be necessary to serve a compelling state interest, and that it is narrowly tailored to achieve that interest." *Reclaim Idaho*, 169 Idaho at 427, 497 P.3d at 181 (quoting *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001)). At some point during the pregnancy, preserving the life of the unborn child undoubtedly becomes a compelling state interest. At that point, the legislature may regulate if it chooses to do so, provided it narrowly tailors any regulation to adequately balance the interests of both the unborn child and its pregnant mother. For example, at oral argument, the State conceded that the legislature's statutes gave preservation of the life of the unborn child superiority over the health of its mother. I find that calculation—which the majority preserves today—to violate a pregnant woman's inalienable rights. However, the question of when precisely the unborn life takes primacy over its mother is not before this Court in these consolidated cases, and I emphatically reject the majority's suggestion to the contrary. I also decline the majority's invitation to adopt the viability line or trimester framework set forth in overruled federal precedent when our strict scrutiny test will more than suffice.

***93** In my view, the brilliance of our constitution is that our founders recognized the primacy of an individual's freedom, and while a woman did not have many rights when Idaho's constitution was adopted, we have now recognized the ignorance and paternalism of that time. Our founders put their faith in individuals by expressing what Locke first described as a human being's natural rights. Those inalienable rights could not be usurped by a government or subjected to what was aptly described as "the tyranny of the majority." When questions of extreme importance must be answered, Idaho's founders put their faith in the individual, not her government. The majority removes that recognition, embodied in Idaho's constitution, that the individual is the master of her fate, she is the captain of her soul. No other person should make life's profound decision to go through that discomfort and pain, as well as the risk of potential complications that result from a pregnancy, not to mention the responsibility that carrying a pregnancy to term entails. Today's decisions places unfettered control over a woman's body with the legislative process. It affords no responsibility to the woman. It gives no recognition to her life, her liberty, her happiness, or her health. Nor does it afford her the medical care that would be readily available to her, but for the legislature's refusal to afford her the decision over which she should have control. For that, she must go elsewhere. A decision which should be made by a woman and her physician is now subject to the caprice of the legislature. Today's decision removes a woman's control over her life and health from her and her doctor, and to the extent any choice still remains, places it in the hands of lawyers and legislators. To my way of thinking, this is backwards. The right should be placed where it belongs, with the woman herself. We should not countenance the fettering of her right to choose the life she seeks to lead in the way this decision does.

This Court's solemn duty is to protect the people and their rights from encroachment by the government. That duty has gone unfulfilled today, and it is the people of Idaho who will suffer for it. Women will leave this great state as a result of this decision, as will the people who love them and wish to see them healthy and alive. As much as that saddens me, I cannot blame them. I cannot overstate the devastating blow Idaho's women have been dealt today. As a result, I respectfully dissent.

All Citations

--- P.3d ----, 2023 WL 110626

Footnotes

1 *Compare* Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice, 948 P.2d 963, 969 (Alaska 1997); *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779, 784 (1981); *In re T.W.*, 551 So.2d 1186, 1192–93 (Fla. 1989); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461, 492 (2019); *Moe v. Secr'y of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387, 645–46 (1981); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, (Minn. 1995); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653–54 (Miss. 1998); *Armstrong v. State*, 296 Mont. 361, 989 P.2d 364, 376 (1999); *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 762 A.2d 620, 631 (2000); *Hope v. Perales*, 150 Misc.2d 985, N.Y.S.2d 972, 977–78 (N.Y. App. Div. 1991), *rev'd on other grounds by* 83 N.Y.2d 563, 611 N.Y.S.2d 811, 634 N.E.2d 183 (994); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000), *superseded by constitutional amendment*, TENN. CONST. art. I, § 36 (enacted 2014); *with* Hope Clinic for Women, Ltd. v. Flores, 372 Ill.Dec. 255, 991 N.E. 2d 745, 757 (2013); *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710, 742 (Iowa 2022); *and Mahaffey v. Attorney General*, 222 Mich.App. 325, 564 N.W.2d 104, 111 (1997), *superseded by constitutional amendment*, Mi. Const. Art. I, § 28 (effective Dec. 24, 2022). Earlier this very day, the Supreme Court of South Carolina joined its sister courts and deemed an abortion ban unconstitutional under Article I, section 10 of the South Carolina Constitution, which protects the right to privacy: "We hold that the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable, and implicates a woman's right to privacy." *Planned Parenthood, et. al. v. South Carolina, et. al.*, No. 28127, slip op. at 5, —— S.C. ——, —— S.E.2d —— (S.C. Jan. 5, 2023).

The Mississippi Supreme Court, for example, held that its constitution protected the right to terminate a pregnancy even though the Mississippi constitution did not expressly provide such a right. *Pro-Choice Mississippi*, 716 So.2d at 653. The court determined that this right derived from Article 3, section 32 of the Mississippi constitution, a provision analogous to Article I, section 21 of the Idaho Constitution: "The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people." *Id.*; Miss. Const. art. 3, § 32. In attempting to persuade the court that the Mississippi constitution did not protect the right to terminate a pregnancy, the State of Mississippi made essentially the same arguments the State of Idaho makes here:

> The State contends that the Mississippi Constitution does not protect a right to abortion, because the framers of the Constitution did not intend to create a right to abortion. They point out that abortion was illegal at the time the Mississippi Constitution of 1890 was drafted, [a year after Idaho's constitution was drafted, but the same year in which Idaho joined the Union] so the framers would not have found it necessary to proscribe a right that did not exist. Alternatively, the State argues that even if abortion had been legal at the time the Constitution was drafted, merely because abortion was legal in 1890 does not, *ipso facto*, determine that a right to abortion is actually protected. The State also asserts that since the Constitution does not grant a specific right to abortion, the judiciary may not create one.

Pro-Choice Mississippi, 716 So.2d at 650. The Mississippi Supreme Court was not swayed, explaining:

> "Each individual enjoys a right of privacy. Each of us has a right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination, if you will." *In re Brown*, 478 So.2d [1033,] 1039 [(Miss. 1985)]. The right to privacy is "the most comprehensive of rights and the right most valued by civilized man." *Id.* (*quoting* Warren and Brandeis, *The Right To Privacy*, 4 Harv. L.Rev. 193, 195 (1890)). "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* (quoting *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891)).

Id. at 653. The court further noted "[i]t requires little awareness of personal prejudice and human nature to know that, generally speaking, no aspects of life is [sic] more personal and private than those having to do with one's ... reproductive system." *Id.* (quoting *Young v. Jackson*, 572 So.2d 378, 382 (Miss. 1990)) (capitalization altered; other alterations in original). Therefore, the court held "that autonomous bodily integrity is protected under the right to privacy" and "[p]rotected within the right of

autonomous bodily integrity is an implicit right to have an abortion." *Id.*

More recently, the Kansas Supreme Court held that section 1 of the Kansas Bill of Rights (the Kansan equivalent to Article I, section 1 of the Idaho Constitution) "protects a woman's right to make decisions about whether she will continue a pregnancy[.]" *Hodes & Nauser*, 440 P.3d at 491. Section 1 of the Kansas Bill of Rights provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." KAN. CONST. Bill of Rights § 1. The court explained:

> [S]ection 1's declaration of natural rights, which specifically includes the rights to liberty and the pursuit of happiness, protects the core right of personal autonomy—which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows Kansans to make their own decisions regarding their bodies, their health, their family formation, and their family life. Pregnant women, like men, possess these rights.

Hodes & Nauser, 440 P.3d at 491–92. Thus, in addition to being implicit in Idaho's concept of ordered liberty, a fundamental right to terminate a pregnancy is further supported by persuasive authority from states with similar constitutional provisions as well.

2 This Court has recently explained that rights are not necessarily deemed less important because they were enacted later in time and, therefore, were not among the first rights listed. *Reclaim Idaho*, 169 Idaho at 439 n.19, 497 P.3d at 193 n.19 (stating that "many of the people's most important rights have come about by constitutional amendment"). While true that these later-enacted rights are not "of lesser importance[,]" *see id.*, the fact that the drafters chose to place the "Inalienable rights of man" as the very first provision in the Idaho Constitution supports the conclusion that we should refrain from simply applying federal precedent here.

3 For example, by failing to hold that a pregnant woman has an inalienable right to life or safety, even without including liberty, or the pursuit of happiness, the majority leaves open the distinct possibility that the "life of the mother" exception will be abolished in future legislation. This is not an idle worry: The Idaho Republican Party—which currently holds a super majority in both the state senate and the house of representatives, as well as the governor's mansion—recently adopted a platform that intentionally excluded a "life of the mother" as a basis for allowing an abortion. Brad Dress, *Idaho GOP Rejects Platform Change Allowing Abortion to Save Person's Life*, The Hill (July 18, 2022, 10:27AM), https://thehill.com/homenews/state-watch/3563905-idaho-gop-rejects-platform-change-allowing-abortion-to-save-womans-life/. If this stated platform were to become law, due to the majority's rejection of a fundamental right today, it is unclear whether Idaho women would have any legal recourse to protect even their own lives. Future legislatures have been given *carte blanche* to try to limit abortion even in ways it was not limited at the time Idaho became a state—in ways that would subject Idaho women to mortal risk.

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

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

Attorneys for Defendant-Intervenor Idaho Legislature

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *59.

This definitive interpretation of Idaho law by our State's highest court is reason enough to reconsider and withdraw the preliminary injunction that has partially[2] blocked enforcement of Section 622 since August. And there are other reasons for doing so too.

Second, the Opinion rejects every state constitutional challenge leveled against Section 622. In so ruling, the Idaho Supreme Court looked to the United States Supreme Court's watershed decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Writing for the Idaho Supreme Court, Justice Brody quoted *Dobbs*'s declaration that "[t]he [United States] Constitution does nor prohibit the citizens of each State from regulating or prohibiting abortion." *Planned Parenthood*, 2023 WL 110626, at *8 (quoting 142 S. Ct. at 2284). She added, as *Dobbs* explained, that the High Court thus "return[ed] that authority to the people and their elected representatives." *Id.* (quoting 142 S. Ct. at 2284). This principle of self-government in a federal republic makes all the difference: "The point being, as the Supreme Court recognized in *Dobbs*, is that each state is different. Thus, whether a state's constitution recognizes abortion as a fundamental right will differ from state to state, based on the language of each state's respective constitution and their respective traditions, statutes, and precedent." *Id.* at *46. Idaho remains free to govern abortion through regular republican processes. "If the people of Idaho are dissatisfied with the policy choices the legislature has made or wish to enshrine a fundamental right to abortion

[2] "Partially" is the right word. Although many speak of the preliminary injunction as blocking the enforcement of Section 622, that injunction's actual scope and impact are not large in terms of people affected. The injunction applies *only* to abortions performed in medical emergencies in the emergency rooms of Idaho hospitals receiving Medicare funding. Our analysis suggests that such abortions amount to less than 2% of all Idaho abortions pre-*Dobbs*. Having said that, the erroneously entered preliminary injunction nevertheless constitutes a large affront to principles of our federalism and to Idaho's sovereignty. *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.").

in the Idaho Constitution, they can make these choices for themselves through the ballot box." *Id.* at *51.

Dobbs—and its basic trust in the American people—stands as an obstacle to the Administration's policy of protecting "reproductive rights," a euphemism for the Government's attempt to preserve the arbitrary and lawless *Roe/Casey* regime. *See, e.g., Protecting Access to Reproductive Healthcare Services*, Executive Order 14076, 87 Fed. Reg. 42053, 42053 (July 13, 2022) ("It remains the policy of my Administration to support a woman's right to choose and to protect and defend reproductive rights."). This civil action is the pursuit of that extra-legal[3] policy through high-stakes litigation.

But as the Legislature's prior briefing shows, the Government's attempt to execute an end-run around *Dobbs* contains fatal flaws. *See* Idaho Legislature's Brief in Support of Motion for Reconsideration of Order Granting Preliminary Injunction, Dkt. 97-1, at 10–11 (the Government policy's collision with the Major Questions Doctrine); *id.* at 11–12 (the Government's erroneous reliance on a non-existent right of action under the Supremacy Clause); *id.* at 15–16 (the Government's wrongful abridgment of Idaho's reserved powers under the Tenth Amendment). By placing heavy reliance on *Dobbs*, the Opinion indirectly highlights the *federal* constitutional errors that bedevil the Government's attempt here to perpetuate federal judicial control of state abortion laws like Section 622.

Third, the Opinion demonstrates that this Court has delayed ruling on the Legislature's pending Motion for Reconsideration long enough. Perhaps this Court postponed action on the off-chance that the Idaho Supreme Court would moot this civil action by invalidating Section 622 as a matter of Idaho law. The opposite has now happened. The Idaho Supreme Court has repudiated

[3] *See, e.g., Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022).

every legal and constitutional objection to Section 622. Section 622 now stands fully vindicated under Idaho law. Further delay in deciding the Legislature's Motion serves no purpose except to unduly prolong this litigation and deny the Legislature a fair opportunity to carry its objections to the Ninth Circuit for appellate review. *See* Legislature's Letter-Brief of November 17, 2022 Requesting Ruling, Dkt. 115. Given the Opinion's unqualified affirmation of Section 622's validity under Idaho law, we again urge the Court to rule on the Motion now.

Dated this 13th day of January, 2023.

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 13th day of January, 2023, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Brian David Netter DOJ-Civ Civil Division 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

Raul Labrador Attorney General David Dewhirst Chief Deputy Attorney General Theo Wold Solicitor General 954 W. Jefferson Street, 2nd Floor P.O. Box 83720 Boise, ID 83720-0010	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: (208) 334-2400 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

RAÚL R. LABRADOR
ATTORNEY GENERAL

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

BRIAN V. CHURCH, ISB #9391
ALAN W. FOUTZ, ISB #11533
Deputy Attorneys General
514 W. Jefferson, 3rd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
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-00329-BLW **STATE OF IDAHO'S MOTION TO STAY ISSUANCE OF A DECISION**

The State of Idaho respectfully requests that the Court stay issuance of a decision on the State's previously filed motion for reconsideration, Dkt. 101, until the Court has disposed of the concomitantly filed request for permission to file supplemental briefing. If the Court permits supplemental briefing, the State requests that the Court continue to stay issuance of the decision on reconsideration until the supplemental briefing has completed.

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/ / /

DATED: January 13, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 2023, 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
ctaylor@jonesday.com

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

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

RAÚL R. LABRADOR
ATTORNEY GENERAL

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

BRIAN V. CHURCH, ISB #9391
ALAN W. FOUTZ, ISB #11533
Deputy Attorneys General
514 W. Jefferson, 3rd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
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-00329-BLW **STATE OF IDAHO'S NOTICE OF SUPPLEMENTAL AUTHORITY AND REQUEST FOR PERMISSION TO FILE SUPPLEMENTAL BRIEFING**

Last week, the Idaho Supreme Court released its decision in the *Planned Parenthood* matters.[1] That decision, including its interpretation of Idaho Code § 18-622, is of significant import to this case, which concerns the interplay of Idaho Code § 18-622 and the Emergency Medical Treatment and Labor Act. The State of Idaho notifies the Court of this supplemental authority in support of its motion for reconsideration of the Court's preliminary injunction. *See*

[1] *Planned Parenthood Great N.W., Haw., Alaska., Ind., Ky. v. State*, Nos. 49615, 49817, 49899, 2023 WL110626, (Idaho Jan. 5, 2023) slip op. available at: https://isc.idaho.gov/opinions/49615xxx.pdf.

Dkt. 101; *see also Whole Women's Health v. Jackson*, 142 S. Ct. 522, 536 (2021) (plurality opinion of Gorsuch, J., in part II-C) (State courts "are the final arbiters of the meaning of state statutory directions."). A copy of the decision is attached.

Because this decision was issued after briefing on the motion for reconsideration was complete, no party's counsel has had the opportunity to weigh in regarding the decision—including the State's recently sworn-in Attorney General, the Honorable Raúl R. Labrador. The State, through Attorney General Labrador, respectfully asks the Court to grant it an opportunity to provide supplemental briefing addressing the major implications that the *Planned Parenthood* decision has on this case and the preliminary injunction.[2] The State proposes that the Court (1) grant the State of Idaho 21 days from the day of the Court's order to file an up-to-10-page supplemental brief addressing the impact of the *Planned Parenthood* decision; (2) grant the United States 21 days from the State's submission to file an up-to-10-page response brief; and (3) grant the State of Idaho 14 days from the United States' submission to file an up-to-5-page reply brief. *Cf.* Loc. Civ. R. 7.1. Granting supplemental briefing on this schedule will permit the Court to be completely informed before deciding the State's motion for reconsideration.[3]

DATED: January 13, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

[2] The State suggests supplemental briefing would be prudent here, given the *Planned Parenthood* decision. Supplemental briefing is within this Court's discretion. *See, e.g., Willnerd v. Sybase, Inc.*, No. 1:09-cv-500-BLW, 2011 WL 652539, at *1 (D. Idaho Feb. 10, 2011).

[3] The State is mindful of the Idaho Legislature's concern regarding the continued injunction of its validly enacted statute "embody[ing] the considered judgment of elected officials concerning Idaho's appropriate regulation of abortion—a matter of profound importance to the people of Idaho." Dkt. 115 at 2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 2023, 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
ctaylor@jonesday.com

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

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

M B & H
MORRIS BOWER & HAWS PLLC

1305 12th Avenue Rd.
Nampa, Idaho 83686
Tel: (208) 345-3333 | Fax: (208) 345-4461

Daniel W. Bower
dbower@morrisbowerhaws.com

November 17, 2022

Sent via ECF

The Honorable B. Lynn Winmill
United States District Court Judge

Re: *United States v. State of Idaho*; Case No. 1:22-cv-329
Letter Brief of Intervenor-Defendant Idaho Legislature

Dear Judge Winmill:

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 request that this Court rule now on two pending motions: Idaho Legislature's Motion for Reconsideration of Order Granting Preliminary Injunction, Dkt. 97 (Sep. 7, 2022) and Idaho Legislature's Renewed Motion to Intervene, Dkt. 105 (Oct. 4, 2022). The reasons for ruling now are compelling.

Chiefly this case centers on the validity of Idaho Code § 18-622. Section 622 was designed to come into effect 30 days after the United States Supreme Court's judgment in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). That triggering provision was widely known at the time. Yet the United States (Government) dallied more than six weeks after *Dobbs* was decided before filing its Motion for Preliminary Injunction, Dkt. 17 (Aug. 8, 2022)[1] and then insisted on expedited briefing, hearing, and decision. Those demands received the Court's approval at every turn. *E.g.*, Dkts. 22, 27, 28, 73, 75, 95. Accordingly, the Court issued its Memorandum Decision and Order granting the preliminary injunction, Dkt. 95, on August 24, 2022, only 17 days after the Government's motion and six days after the last party brief.

The Legislature quickly responded by filing its Motion for Reconsideration on September 7, 2022. But with its desired preliminary injunction in hand, the Government assumed a more deliberate—one might even say leisurely—approach. *E.g.,* Dkt. 99; *accord* Dkt. 100 (Attorney General's Office's corresponding approach). Again, the Court saw

[1] *See* Memorandum Decision and Order, Dkt. 27 ("[T]he 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.").

things the Government's way. Dkt. 102. Briefing on the Motion for Reconsideration concluded on October 26, 2022. Dkts. 111, 112. That was 22 days ago.

Please compare the pace of motions practice culminating in the preliminary injunction with the pace since then:

Government's motion on preliminary injunction

- Days from filing to ruling: 17
- Days from completion of briefing to ruling: 6

The Legislature's motion on preliminary injunction

- Days from filing to ruling: 71 and counting
- Days from completion of briefing to ruling: 22 and counting

Similar delays are withholding a resolution of the Idaho Legislature's Renewed Motion to Intervene. Forty-four days have elapsed since that Motion was filed, with no ruling yet.

As to the considerations for ruling now, of paramount importance is the nature of Idaho's interests implicated and harmed by the ongoing effect of the preliminary injunction. Every day that passes with a preliminary injunction blocking full operation of section 622 inflicts irreparable harm on the State of Idaho and its people. *See 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."). The harms imposed by the preliminary injunction here are especially grave. Section 622 is no ordinary statute; it embodies the considered judgment of elected officials concerning Idaho's appropriate regulation of abortion—a matter of profound importance to the people of Idaho. Halting its full operation should occur (if at all) only after all reasonable arguments to the contrary have been fully and fairly considered.

With respect to the timing of a ruling, the question is not whether the Court agrees with the motion for reconsideration and what that motion teaches about Idaho's interests. The question is whether Idaho in fairness ought to have the motion resolved now. When the Government came before the Court asserting federal interests and asking for virtually immediate ruling, the Court complied. The Legislature asks for the same treatment.

The timing of the Court's rulings on the two pending motions also implicates the Legislature's rights and interests relative to appellate review. Congress by statute and the courts by decisions have given the Legislature the right to immediate interlocutory appellate review of adverse rulings on both the preliminary injunction and the intervention matters.[2] Delay in ruling on the two pending motions thus operates to frustrate on a day-by-day basis that right. And importantly for appellate review purposes, the two motions

[2] *See* 28 U.S.C. § 1291(a) (injunctions); *United States v. City of Oakland*, 958 F.2d 300, (9th Cir. 1992) ("the denial [of a motion to intervene] must be appealed on an interlocutory basis").

are inextricably interwoven, as demonstrated by the Government's own position. It has asserted here, and presumably will attempt to do so on appellate review, that the Legislature's present limited intervention status precludes it from making a full and robust challenge to the preliminary injunction.[3] Accordingly and as a practical matter, delay on one motion is the same as delay on both motions, and that delay operates to infringe on the Legislature's undoubted legal right to immediate appellate review of the Court's adverse decisions—decisions fairly seen by the Legislature as implicating Idaho's profound interests and the Legislature's responsibilities.[4]

For all these reasons, the Legislature respectfully asks the Court to issue decisions on the pending Motion for Reconsideration and Renewed Motion to Intervene.

Respectfully submitted,

/s/ Daniel W. Bower
Daniel W. Bower

/s/ Monte Neil Stewart
Monte Neil Stewart
Attorneys for Intervenor-Defendants

[3] Government's Opposition to Motion for Reconsideration at 5–6, Dkt. 106 ("The Legislature has exceeded the scope of its permitted intervention.").

[4] Idaho Code § 67-465 (authorizing "either or both houses of the legislature" to intervene "as a matter of right" in any case "challeng[ing] in state or federal court the constitutionality of an Idaho statute" or contending that "an Idaho statute [is] … preempted by federal law").

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 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

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

Nos. 23-35440 & 23-35450

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO
Defendant,
v.
MIKE MOYLE, Speaker of the Idaho House of Representatives; et al.,
Intervenors-Appellants

Appeal from the United States District Court
for the District of Idaho
Honorable B. Lynn Winmill
(1:22-cv-00329-BLW)

IDAHO LEGISLATURE'S EXCERPTS OF RECORD
VOLUME 3 OF 4

Monte Neil Stewart
11000 Cherwell Court
Las Vegas, NV 89144
Telephone: (208) 514-6360
monteneilstewart@gmail.com

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

Counsel for Intervenors-Appellants

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. 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 **MOTION HEARING**

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE B. LYNN WINMILL
MONDAY, AUGUST 22, 2022; 9:02 A.M.
BOISE, IDAHO

Proceedings recorded by mechanical stenography, transcript produced by computer.

TAMARA I. HOHENLEITNER, CSR 619, CRR
FEDERAL OFFICIAL COURT REPORTER
550 WEST FORT STREET, BOISE, IDAHO 83724

A P P E A R A N C E S

FOR THE UNITED STATES OF AMERICA
Brian D. Netter, Deputy Assistant Attorney General
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
1100 L Street, N.W.
Washington, D.C. 20005

FOR DEFENDANT STATE OF IDAHO
Brian V. Church, Deputy Attorney General
Clay R. Smith, Special Deputy Attorney General
LAWRENCE G. WASDEN ATTORNEY GENERAL
CIVIL LITIGATION DIVISION
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010

Joan E. Callahan, Special Deputy Attorney General
NAYLOR & HALES, P.C.
950 W. Bannock Street, Suite 610
Boise, ID 83702

FOR INTERVENOR-DEFENDANTS
Daniel W. Bower
MORRIS BOWER & HAWS PLLC
1305 12th Avenue Road
Nampa, Idaho 83686

Monte Neil Stewart
Attorney at Law
11000 Cherwell Court
Las Vegas, Nevada 89144

I N D E X

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P R O C E E D I N G S

August 22, 2022

THE CLERK: The Court will now hear Civil Case 22-329, *United States of America vs. The State of Idaho*, regarding plaintiff's motion for a preliminary injunction.

THE COURT: Good morning, Counsel.

Before we take up this matter, I did want -- we did provide a call-in number. I don't know if anyone has taken advantage of that, but it's something that we have only been able to do during the pandemic. But I did need to remind anyone who is listening in that it is against federal law to try to record court proceedings even from a remote location.

Of course, that would apply to anyone here in the courtroom as well, but we're usually not as concerned about that happening as we would if someone were simply listening in by a telephone connection.

As we begin, I have given counsel 45 minutes per side. I'm going to make some initial observations intended just to point out where I have some concerns so that you can target your argument appropriately.

I do want to point out at the outset my appreciation for the considerable energy and skill demonstrated by the briefs and declarations which the parties have submitted. It's been immensely helpful, created a lot of work. The amicus briefing was also excellent and provided, I think, a real broad

understanding as to the various points in this.

Now, before I actually get to offering those initial observations, I hope it is clear to everyone here, this is not a case about the wisdom of *Dobbs* or the wisdom of *Roe v. Wade*. That really is completely secondary to this decision. *Dobbs* is the law of the land, and that will not be questioned here. The only question is resolving a conflict or apparent conflict between federal and state law under the supremacy clause of the United States Constitution.

Now, let me address some of the concerns. I think I have two or three concerns for the State and one concern for the Government, but I'm offering them here because you both may want to comment on them.

It struck me that the State, both in their brief -- both in their briefing and in their declarations, attempted to state their arguments in language other than what was actually included in Idaho's abortion statute.

Routinely you argued, both in briefing and in declarations, that the statute provides an affirmative defense to a doctor who may be prosecuted under its provisions if the doctor has a good faith belief that the abortion was necessary because the medical condition was life-threatening. That's the word that was kind of pretty consistently used throughout the briefing and declarations.

The United States, in its reply brief, makes a

compelling argument that this is a rewriting of the statute since the statute only permits the affirmative defense if the abortion was, quote, "necessary to prevent death," close quote.

So the question is: Does the statute provide for an affirmative defense if the medical condition would be, without an abortion, life-threatening, or is the abortion truly necessary to prevent death, or are they the same thing?

But relying on Black's Law Dictionary and Idaho Supreme Court cases, the U.S. makes a strong argument that "necessary" means indispensable or absolutely needed.

And I guess I have to share that I have the same concern that the statute would only provide the doctor with an affirmative defense if he or she believed in good faith that the patient would, in fact, die unless the abortion is performed. And that is quite different from simply being life-threatening, which suggests only a possibility of death.

So that's one issue I really want the State to hit head on. And I would note you didn't have a chance to respond to it because it came up in the reply brief. But then it only came up in the reply brief because it was a kind of reframing of the issue by the State in its response brief.

The second question is somewhat related, and it's simply this: That even if the "necessary to prevent death" language can be read as meaning life-threatening, that deals only with situations where the patient's death is either going

to happen or is at least a probability.

But there are situations which I think have been pointed out primarily in the amicus and the United States' submissions where a doctor may well believe that in the hospital setting, they can prevent or substantially reduce the chance of the patient's death, but that there is still a substantial likelihood that the patient will be left with serious medical injuries if an abortion is not performed. They may be left infertile or have temporary or permanent major organ failure or have a stroke, leaving the patient with long-term serious disability.

As I would note, the submissions from the United States suggest that is more than just a hypothetical concern.

My concern is that in that setting, where the death of the patient is not likely but it is still going to have very serious medical consequences for the patient, there would seem to be just an absolute conflict between EMTALA and the Idaho abortion statute.

So on that front, it strikes me at least initially that the impossibility preemption applies. And I need to have the State hit that head on, why that is not truly a conflict between the statutes.

Okay. For the Government, here is the concern I would like to make sure you address: In this case, it appears that we

have express preemption because of the language of EMTALA. And since the touchstone of preemption is Congressional intent, then is it not true that the Idaho abortion statute is only preempted if it directly conflicts with EMTALA? That's the language in EMTALA itself. There must be a direct conflict, or there is no preemption.

So does that make the implied preemption principle, such as impossibility and obstacle preemption, not relevant? And then how does that bear upon this case?

So those are the three concerns I thought I would throw -- I know I'll have questions as we get into this more deeply, but I wanted counsel to be aware of at least those three concerns.

I guess just one last observation that is more general in nature. You know, I have been a judge for a lot of years. I have sat and observed the application of our criminal laws, and I think it's pretty obvious that our legislature and Congress think that passing criminal laws will change behavior. And from my time on the bench, I have seen that change in behavior applies not just in the core of the criminal statute but around the edges.

Simply put, we assume that rational people will not just literally comply with the criminal statute but will avoid conduct which might even be viewed as violating the statute simply because of the impact of being charged even if you're

able to obtain an acquittal.

Intentionally or otherwise, the abortion statute, if that premise is correct, will cause doctors to steer clear of conduct that could be seen as violating the Idaho abortion statute. It would be a rare situation where a doctor is going to be willing or anxious to push the limits and go right up to the edge of what is allowed under the Idaho abortion statute. In essence, they will seek a safe harbor in which they have no chance of prosecution.

Does that almost not create obstacle preemption if the doctors are risk averse? I mean, I think it's in the very nature of their profession.

So I want, again, counsel to be aware that I just had that general concern that really is a reflection of what I have observed as a judge in handling a lot of criminal cases and kind of having a sense of what Congress and the legislature intend when they pass criminal laws trying to not only criminalize behavior but change behavior both directly within the statute and on its edges.

So, with that, let's go ahead and begin.

Mr. Netter, I think you'll start. I understand you're going to reserve 20 minutes for rebuttal. And we have a clock, which is more for your aid. I actually use it pretty strictly in some cases to keep attorneys on time. I don't think that will be too much of an issue because we have given you a lot of

time to argue, but it will give you some idea of where you are with the time allotted.

So, Mr. Netter.

MR. NETTER: Thank you, Your Honor.

Good morning, Your Honor. May it please the Court. Brian Netter, U.S. Department of Justice, for the United States.

Each of us will, at some point in our lives, encounter a medical emergency for ourselves, for a friend, for a loved one. We hope that when that point of medical crisis arrives, the person in need is able to get to a hospital where a doctor or a nurse who has trained their entire professional life for that moment, trained for years, will know the right treatment to administer.

And although perhaps it should go unsaid, we hope that in that moment, the doctor or the nurse will be able to administer the treatment, will not be precluded, will not be forced to hesitate out of fear that the doctor or nurse, him or herself, will face criminal sanctions.

As the Court has acknowledged, this case arises under a federal law called EMTALA, the Emergency Medical Treatment and Labor Act. Under EMTALA, when a patient arrives at a participating hospital with an emergency medical condition, the physician is required to offer what's called a stabilizing treatment. Any state law that conflicts directly with that requirement is preempted.

So let me address right here at the outset the Court's question about what preemption means in the context of EMTALA, because that is governed by binding Ninth Circuit precedent, a case called *Draper vs. Chiapuzio* that was decided by the Ninth Circuit in 1993.

In that case, the Ninth Circuit said, while construing EMTALA, the 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, quote, "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

So we believe that answers the question and that both physical impossibility and obstacle preemption are within the scope of the statutory preemption provision of EMTALA.

THE COURT: Yeah. I read that decision, and I can't disagree with it because it is -- well, I guess I can disagree with it. I have to follow it because it's the Ninth Circuit precedent. But it struck me as a little odd because there does seem to be express preemption; and, as such, we look directly at the language of the statute. And the statute says there is only a conflict or preemption if there is direct conflict.

But you're right. I mean, that is the case that I think governs that, but, you know, I'm going to -- I will wait to hear what the legislature and the State of Idaho has to say,

but I did wonder at the time when I read the decision that they seemed to be going a little further than they needed to; and where there is express language about preemption, that would seem to govern the issue.

But you hit the exact case. I mean, that was exactly the response I thought you would make, but I wanted to hear you make that argument.

Go ahead.

MR. NETTER: Well, let me just add one additional point on that, Your Honor, which is that the legislative history of EMTALA indicates that the purpose behind the preemption provision was to ensure that states would be able to enforce stricter laws that required even greater provision of emergency care.

So it's sensible in that circumstance for the preemption provision to be interpreted to prevent a state from erecting obstacles to the full purposes and objectives of Congress.

So we're here today, of course, because sometimes a patient who arrives at a participating hospital with an emergency medical condition is pregnant. And sometimes the stabilizing treatment that is necessary to save the life or protect the health of that patient is an abortion.

And yet, Idaho has a law set to go into effect this week which the state supreme court has described as a total

abortion ban that is poised to subject doctors and nurses who participate in any abortion to the felony criminal process.

Now, as the briefing in this case has demonstrated, there are some issues on which the State, the legislature, and the United States agree. Principally, everybody seems to agree that there is some preemption; and to the extent that EMTALA governs, the State of Idaho doesn't have the authority to override that.

Additionally, the State and the intervenors appear to agree that EMTALA does require abortions as a stabilizing treatment under some circumstances.

The primary dispute between the parties is whether there is an actual dispute: what the scope of the Idaho law is, and how that compares to the protections afforded by EMTALA.

With respect to that, there are both legal and factual angles. Primarily, of course, the interpretation of EMTALA and the interpretation of Idaho law, that's a question of law for this Court to determine.

Now, there are some additional factual questions as to what actual medical conditions can arise that fit within the gap between Idaho law and EMTALA.

As has been identified in the briefs and in the accompanying declarations, there are a number of conditions that affect pregnant individuals that would fall within this gap, potentially including ectopic pregnancy, preterm/prelabor

rupture of membranes, placental abruption, preeclampsia with severe features, sepsis, cardiovascular disease, and the list goes on.

I would like to discuss a bit the facts and the powerful declarations that were submitted by obstetricians and gynecologists within the state of Ohio *[sic]* who are set to be subject to this law in the coming days.

But first we should start with the law. Because the way that 18-622 was crafted here is very telling, because the Idaho Code part governing abortion contains a definition. It has a definition for medical emergency. And the legislature told us in its motion to intervene, Docket 15-1, that the definition of medical emergency in the Idaho Code, which was used by the legislature in the 2021 Heartbeat Law, was designed to track EMTALA, and that 18-622, the Total Abortion Ban, was intended to be narrower. When the legislature told us that, we should believe it.

It's a standard canon of statutory interpretation that when Congress or when a state legislature uses different language to cover different concepts, a different outcome is intended. That was certainly the case here.

There was an article published in the *Idaho Capitol Sun* on Friday that transcribed some of the colloquy in the committee hearing of the legislation that resulted in 18-622. And I found that to be rather telling.

During the hearing of the House State Affairs Committee, Representative Brooke Green asked the sponsor of the legislation, Representative Todd Lakey, why there was no exception for the health of the pregnant individual.

What he said is: "If you're talking about the health of the mother, that's a nuanced decision that could be something much less than life, where if the decision was based solely on a question of some type of health, then you're talking about taking the life of the unborn child," he said.

After Representative Green asked if that meant that the health of the woman was irrelevant, Representative Lakey said, "I would say it weighs less, yes, than the life of the child."

So I think this indicates, Your Honor, that the different framing, the different phrasing "necessary to prevent the life" *[sic]* as opposed to the much broader categories that appear in EMTALA and that appeared even in other abortion restrictions adopted by this legislature, that that's significant.

There is a reason why different language was adopted here, and that reason requires the injunctive relief that has been requested by the United States.

Of course, the text of 18-622 confirms that to be true. The language "necessary to prevent the death" is not couched in probabilistic terms. Necessary is absolute; it means

indispensable. The State confirmed as much in its submission to the Idaho Supreme Court just 32 days ago in *Planned Parenthood Great Northwest vs. State*.

In response to an argument that this language was vague, the State said that the affirmative defense is available only if the procedure is, quote, "essential to stop the death of a pregnant woman."

THE COURT: This was from the oral argument before the Idaho Supreme Court?

MR. NETTER: That was in the briefing --

THE COURT: The briefing.

MR. NETTER: -- that led to the oral argument. Yes, Your Honor.

It's no wonder, under that standard, that physicians are fearful of practicing under a regime in which federal law and the Hippocratic oath require the provision of care, but Idaho law says that providing the care potentially makes you a felon.

So now much of the briefing, as a factual matter, has hinged on the question of what the legislature calls relevant abortions and whether they exist. The reality, which I think each of us has experienced over the course of our lives, is that pregnancies sometimes have complications. And that's true in Idaho just as it's true everywhere else.

The legislature submitted what it called some official

data, trying to suggest that emergency abortions are exceedingly rare in Idaho and that there have been only a handful over the period covered by the data, the past 10 to 12 years. So I wanted quickly to point out why that assessment of the data is manifestly incorrect.

The legislature looked at official data that covered only pregnant individuals who were less than 18 who were also unable to obtain the consent of their parents or guardians or pregnant individuals who were seeking an abortion more than 20 weeks after fertilization, which is at a gestational age of 22 weeks or later.

There is additional data that we have submitted in our papers -- this is at Docket 86-6 at 10, which is ECF page 11 -- that indicates that abortions that take place after 22 weeks' gestational age account for something like 0.1 percent of the abortions in Idaho.

So the suggestion that there aren't emergency abortions in this state is unfortunately incorrect, and the declarations that we have submitted demonstrate that to be the case.

And these are not only procedures that take place at the moment where the doctor knows that if the procedure does not happen, the patient will die. Medical needs occur on a spectrum where there are times when a disease will progress, where there could be organ damage, where there could be serious implications

for a patient's health and where waiting for additional treatment is going to cause even greater complications. And then there may be a later time when it is actually the case that an abortion is truly necessary to save an individual's life, but the costs that are borne during that interim period are serious and reflect some of the delta between EMTALA and Idaho law.

I would refer the Court in particular to the supplemental declaration of Dr. Emily Corrigan, who is an obstetrician/gynecologist at Saint Alphonsus here in Boise. And that's at Docket 86-3, and her initial declaration was at Docket 17-6.

She identified three patients on which she was aware of actual emergency abortions that had been necessary, Jane Does 1, 2, and 3.

Jane Doe 1 experienced preterm/prelabor rupture of membranes, and Dr. Corrigan said in her supplemental declaration that, in some circumstances, it could become serious enough to result in death, but it might just require limb amputations or a hysterectomy.

Jane Doe No. 2 was suffering from a placental abruption, where the placenta prematurely detaches from the uterine wall. That condition, she testified, might just cause kidney failure or a brain injury.

Jane Doe 3 had a condition called water on the lungs that might just cause a lung injury rather than death.

Considering all this, Dr. Corrigan explained that she told her hospital that OB/GYN physicians in Idaho are, quote, "bracing for the impact of this law as if it is a large meteor headed toward Idaho."

Now, it nearly goes without saying in the text of EMTALA, the circumstances in which stabilizing treatment must be offered are considerably broader. EMTALA is phrased in probabilistic terms: When the absence of treatment is reasonably expected to result in placing the health of a patient in serious jeopardy, in serious impairment to bodily functions, in serious dysfunction of any bodily organ or part.

The conditions described by Dr. Corrigan plainly describe there being abortions that are necessary under EMTALA, that are required as a matter of federal law that Idaho law would set -- is poised to criminalize.

There is also, of course, a fairly common complication of pregnancy, ectopic pregnancy, that is discussed in the briefing.

Dr. Amelia Huntsberger in Sandpoint, Idaho, at Docket 86-4, explains that not every patient with an ectopic pregnancy will die without treatment, which I take to mean that there are circumstances in which it may be possible, theoretically, to wait for a fallopian tube to rupture and for the fetal heartbeat to stop before trying to clean up the internal bleeding and organ damage.

Now, the legislature has argued that ectopic pregnancy -- that treatment of an ectopic pregnancy is not within the scope of the law. The State, notably, has not taken that position.

And the legislature has not grappled with the statutory text in the slightest in trying to explain to this Court or to physicians why the treatment of an ectopic pregnancy would not constitute criminal abortion under Idaho law.

As the Court indicated, with respect to obstacle preemption, there are questions here about the chilling effect. And one thing I haven't discussed yet is the very peculiar manner in which the supposed exception of this law is structured: That ordinarily if a state were to want to criminalize abortion except in certain circumstances, it would be the burden of the prosecutor to establish that those circumstances were not met, and the prosecutor would have to make that proof beyond a reasonable doubt.

Here, however, the presumption is flipped. Here, a prima facie criminal violation is established any time an abortion is performed within the state of Idaho. Full stop. The only way for a physician to avoid becoming a felon and going to jail for up to five years is by proving up the affirmative defense and convincing the jury, on the physician's burden or on the nurse's burden, by a preponderance of evidence that this narrow affirmative defense has been satisfied.

It hardly seems necessary to point out that doctors would avoid the risks of a criminal trial if at all possible. But, again, we have declarations to demonstrate that that's the case.

Dr. Kylie Cooper, an OB/GYN and maternal-fetal medicine specialist at St. Luke's here in Boise, said in her supplemental declaration, Docket 86-5, that as a physician who is practicing in Idaho and through her personal interactions with healthcare providers around the state, as well as through her positions with ACOG, the American College of Obstetricians and Gynecologists, the Idaho Perinatal Project Advisory Board, and the Idaho Coalition for Safe Reproductive Healthcare, providers' fear -- provider fear and unease is real and widespread.

The State and the legislature don't have any response to this. Indeed, the Attorney General's Office doesn't seem to argue on this point at all. They don't dispute the chilling effect.

The legislature insists that prosecutors would exercise their discretion prudently. As a matter of law, that simply doesn't matter. The Ninth Circuit held in *United States vs. City of Arcata* that in that case, the City's promise of self-restraint does not affect our consideration of the ordinance's validity.

That's the case here. And I think that it is

transparently the case that submitting a declaration from one county prosecutor in a state that has 43 elected county prosecutors provides no comfort to the physicians and the nurses -- excuse me -- of this state.

Because, as Dr. Huntsberger pointed out in her declaration, the very nature of discretion is that different people are going to exercise it differently.

And even if it were the case that all 43 county prosecutors could attest to the fact that they didn't intend to prosecute under these circumstances, Idaho law has a provision under which a member of a grand jury can identify the commission of an offense and that fellow jurors must thereafter investigate the same. That's Idaho Code 19-1108.

Likewise, there is a citizen complaint provision whereunder any individual within the state of Idaho can go to a magistrate with a criminal complaint. Under those circumstances, the magistrate doesn't appear to have discretion. If the elements of the crime are satisfied, then the magistrate has to endorse the complaint.

And even if these procedures were not sufficiently troubling, there is the fact of the statute of limitations. There is a five-year statute of limitations on felonies in Idaho, which means even if today's prosecutors decided that they were not inclined to prosecute these offenses, nothing would prevent a future prosecutor, perhaps one elected after today's

date, from taking up abortions that happened during the interim.

So, Your Honor, the United States filed this action because federal law contains a requirement. The requirement is for emergency care to be offered under certain circumstances, that federal law preempts contrary state laws. And the preemption effect is particularly powerful here, where lives, livelihood, and health are surely on the line.

The State's legal interpretation of its statute doesn't measure up and isn't consistent with the interpretations that the State offered to its own supreme court only a month ago. And the factual circumstances demonstrate that the need for judicial intervention is dire.

So I'll be happy to respond to any additional questions the Court has or to respond after the State and legislature have an opportunity to speak.

THE COURT: I may have more questions after. But you're going to reserve the balance of your time?

MR. NETTER: I will, Your Honor. Thank you.

THE COURT: Very good. Thank you, Mr. Netter.

Mr. Church.

MR. CHURCH: Thank you very much, Your Honor.

THE COURT: While you're getting up there, I would like you to respond to Mr. Netter's -- well, to the issue of whether or not an ectopic pregnancy is a pregnancy.

Just looking at the plain language of the statute, I

know there has been an argument that it's not -- or at least it's not an abortion to end an ectopic pregnancy, but the "abortion" is defined as "terminating any clinically diagnosable pregnancy," and "pregnancy" is defined as "having a developing fetus in the body and commences with fertilization."

Isn't even an ectopic pregnancy a developing fetus after fertilization? And why is that not kind of dispositive on that issue?

I'm only asking that question now because that was kind of the last point that Mr. Netter made, and it was on my mind. Go ahead.

MR. CHURCH: Good morning again, Your Honor. May it please the Court. Deputy Attorney General Brian Church on behalf of the State of Idaho.

Let me begin by tackling the question you just asked, Your Honor. And as the State, I am bound by what the legislature has wrote with respect to what a definition is of an abortion under Idaho Code 18-604(1).

Your Honor, it is our understanding that with respect to an ectopic pregnancy, that that would be defined as a pregnancy under law and that it would be direct with respect to your question.

Now, in this case, Your Honor --

THE COURT: Just so we're clear, then, that necessarily follows that if you end that pregnancy through an

abortion, through a termination of the developing fetus in the fallopian tube, that that would be an abortion?

MR. CHURCH: Yes, Your Honor, again, based upon Idaho Code 18-604(1).

THE COURT: And sub 11, which I think is the definition of pregnancy.

MR. CHURCH: That would be correct, Your Honor. And with respect to sub 1, which defines abortion, the State is bound by the definition --

THE COURT: Okay.

MR. CHURCH: -- that has been provided, Your Honor.

THE COURT: Thank you for your candor. Go ahead.

MR. CHURCH: I appreciate that. Thank you very much, Your Honor.

In this case, Your Honor, the United States asked this Court to enjoin Idaho from enforcing Idaho Code Section 18-622 against any provider in every instance where 18-622 and the Treatment Act may apply. This Court should deny the preliminary injunction for four reasons.

First, the United States has not shown that every abortion performed as a stabilizing treatment would conflict with 18-622 and so has not met its burden for a facial challenge.

Second --

THE COURT: All right. Well, let me -- you're going

to challenge my memory here. Go ahead and make the four points, but I'm going to have questions about all of them, because the whole issue of as applied or facial challenge, I don't understand the United States to be arguing that the entire statute is invalid, only that it's invalid when applied in an emergency room setting where there are EMTALA obligations.

How does that become -- well, I will ask you, when you finish your list -- so be prepared -- why that makes it a facial application. And then the follow-up question is: Why does it matter?

Go ahead. And you have to understand, I'm going to have a lot of questions here. And I will try to ask them in a way that does not disrupt the flow of your argument, but I can't promise that. So go ahead.

MR. CHURCH: Your Honor, I appreciate the interruption. And I appreciate the opportunity, on behalf of the State, to answer the Court's questions.

As Your Honor has indicated, I would like to finish the four points, and I will directly respond to your question about the facial challenge.

The second reason, Your Honor, that this Court should deny the injunctive relief is that the Treatment Act with its savings provision, which is 1395dd(f), does not preempt Idaho from imposing criminal consequences for a violation of 18-622, as the savings provision allows each state law requirement to

stand unless it directly conflicts with the requirement in the Treatment Act.

THE COURT: Yeah. That was my discussion with Mr. Netter. And that's, I think, an issue he has to address. So you will need to be prepared to address the Ninth Circuit's take on that language, which I'm not sure I understand but I have to follow.

So go ahead.

MR. CHURCH: I appreciate that, Your Honor.

The third reason why the Court should deny injunctive relief in this case is that there is no direct conflict with a Treatment Act requirement because Idaho chose to make an exception to criminal liability and affirmative defense which has the doctor assert a subjective good-faith medical judgment as his or her defense.

THE COURT: And I will ask you, once you have completed -- that it's not an exception; it is an affirmative defense.

Do you agree with that?

MR. CHURCH: Well, Your Honor, it is an affirmative defense, but it's also an exception to criminal liability. And it's just the way in which the burden shifts, Your Honor.

As even Mr. Netter pointed out, under a typical exception, which, like the fetal heartbeat, for instance, would have, it would be the burden of a prosecutor.

THE COURT: To prove beyond a reasonable doubt that the exception does not apply?

MR. CHURCH: That would be correct, Your Honor.

But, as we'll point out in just a moment, I'm not sure that there is any material difference between an affirmative defense which has the physician maintaining the burden and the prosecutor maintaining a burden; each that proves an exception to criminal liability, at least for preemption purposes, Your Honor, and at least with respect to a direct conflict with a Treatment Act requirement, which is what the savings provision requires.

THE COURT: Okay.

MR. CHURCH: The fourth reason, Your Honor, why the State of Idaho would ask this Court deny injunctive relief is that even though the United States' declarants made clear that they could determine when an abortion was necessary to preserve the life of a pregnant woman, the United States has not shown that doctors in all instances would be chilled by an alleged conflict between 18-622 and the Treatment Act such that the entire purpose of the Treatment Act would be nullified.

Your Honor, I understand you wanted me to first address the question about the facial challenge, and I would like to go ahead and go there now.

THE COURT: Yes.

MR. CHURCH: So, Your Honor, my understanding of the

United States' requested relief in this case is for a preliminary injunction. I'm going to go to their filing of their proposed order, which is at Docket 17-2.

The proposed order in this case, as I understand, seeks an injunction of the State not only as with respect to the United States itself but that would enjoin the State from applying Idaho Code 18-622 to any abortion performed by any physician or hospital within the state of Idaho.

And that would be the second full paragraph of the -- or the second further-ordered paragraph that is in that -- in that docket.

And the reason why I point that out, Your Honor, is because, as I understand the relief that's requested in this case, it is relief that is beyond just the United States itself; it's relief that goes to additional parties.

THE COURT: Well, Counsel, I wanted to -- well, I checked the transcript to see if I heard you correctly. You are saying that the State is requesting that 18-622 have no application in any emergency room in the state of Idaho? Are you saying that's the requested relief?

MR. CHURCH: No, Your Honor.

THE COURT: Okay. I misunderstood. Would you restate that so I'm sure, so that we are clearly communicating here.

MR. CHURCH: Sure. I want to be clear on that, Your Honor. Thank you.

THE COURT: Well, let me take a stab at the way I understand the relief requested, which is that 18-622 would have no application in any emergency room which has been provided with Medicare funding and where EMTALA would require that an abortion be performed. That's my understanding of what the United States is asking.

MR. CHURCH: Let me add one caveat to that, Your Honor.

I think, in addition to that, one of the things that's being requested or as part of that request, Your Honor, is that the State of Idaho not be allowed to either take criminal action against or licensing action against any physician or hospital as a result of an alleged conflict between 18-622 and the Treatment Act.

So, Your Honor, the scope of relief is going beyond just the United States here. It would also apply in circumstances to persons who are not even parties to this proceeding, namely, physicians and potentially hospitals as well.

THE COURT: Are you arguing this as a standing issue?

MR. CHURCH: No, I'm not arguing this as a standing issue, Your Honor. I'm arguing this as part of why this is a facial challenge.

Because some of the case law -- the *John Doe* case that we cited, for instance -- I think helps make this point that

some of the relief here is going beyond just a particular abortion that maybe the United States would be raising to the State of Idaho.

Recall, Your Honor, that this pre-enforcement challenge is going at every single time an abortion may be provided as stabilizing treatment under the Treatment Act, and the United States is attempting to block the enforcement of 18-622 in every single instance.

And for that reason, Your Honor, we believe that this is a facial attack that the United States bears the burden under the *Salerno* test of showing that there are zero instances where 18-622 can be applied with the Treatment Act.

And, Your Honor, we believe clearly -- and as the original declarations seem to indicate -- the doctors in this case are able to determine what is necessary to preserve the life of a woman or necessary to prevent the death of a pregnant woman, which is what 18-622 authorizes.

So we are not seeing a direct conflict in those instances, Your Honor. As such, that would defeat the facial challenge in this case, because there are certainly instances where Idaho Code 18-622 can be applied where there is an abortion provided as stabilizing treatment under the Treatment Act.

As such, because it's a facial challenge, that is the key point, Your Honor, is that they haven't met their burden of

showing that there is zero instances where those two acts can be applied together.

Now, Your Honor did ask about our position on life-threatening versus necessary to prevent the death or necessary to preserve the life of a woman. And I do want to address that, Your Honor.

And I guess one point is -- that I would note is that our understanding of what the language means with respect to Idaho Code 18-622 is that it's consistent with, I think, the general purpose of the Hyde Amendment, the current Hyde Amendment that governs the federal trust funds that are provided for Medicare purposes.

And this is from Public Law 117-103. It's one of the laws cited by the United States. And I am specifically reading from 136 Statutes at Large 496. And this is Section 507.

It explains that the limitations established in the preceding section, which as I understand it generally prohibit the funds -- federal funds from going to abortion, do not apply to an abortion, one, if the pregnancy is the result of an act of rape or incest -- which is covered as part of 18-622, Your Honor -- or, second, in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself that would, as certified by a physician, place the woman in danger of death unless an abortion

is performed.

THE COURT: I'm not sure I completely understand why that statute is relevant when we have -- that's a federal statute. And is it directly applicable to the EMTALA obligations?

MR. CHURCH: Well, it's not directly applicable, Your Honor, but it's also -- it's consistent with -- we are offering it solely to show that our interpretation is consistent with the --

THE COURT: Well, you're saying that the Idaho legislature, when they said that the abortion was necessary to avoid the death of the patient, that they were really thinking what Congress said when they are dealing with it in a totally different context. I'm not sure I understand how that flows.

MR. CHURCH: Well, let me make two points with respect to that, Your Honor. I think the first point, you said "necessary to avoid the death of the woman." That's not the language of the statute.

THE COURT: Well, I was paraphrasing. But the word "necessary" is there, and that's the operative term.

MR. CHURCH: That is correct; the word "necessary" is there. And it's necessary to prevent the death of the pregnant woman.

I offered the example of the current Hyde Amendment simply to show that our interpretation of Idaho Code 18-622

appears to be consistent with what the Hyde Amendment provides as a matter of federal law.

It's not to shed light on exactly what 18-622's terms mean. That would be a question of law, as Mr. Netter pointed out, for this Court or, really, the Idaho Supreme Court to determine.

And, Your Honor, with respect to that, you know, that's also why we could have an as-applied challenge as part of a prosecution. If there truly is a prosecution, Your Honor, of a physician, that physician could argue that the abortion was, in his or her good-faith medical judgment -- which is a subjective standard -- that the abortion was necessary to prevent the death of a woman.

That is a subjective standard, and the Court would be well -- in a criminal prosecution would be well capable of handling determining whether the -- whether the physician has made that showing and made -- made clear that the affirmative defense would apply.

THE COURT: Let me ask -- and this came up from Mr. Netter's suggestion that, within the last few weeks, your office has appeared before the Idaho Supreme Court and argued, to avoid a suggestion of ambiguity, that the statute clearly requires that the procedure of abortion was essential to prevent the death of a pregnant woman.

Essential is different than a risk.

Again, I don't know if you argued that or not or if someone else in your office did, but I'm sure your office wants to be consistent.

Could you kind of just explain why that should not be troublesome to the Court.

MR. CHURCH: Sure. That should not be troublesome to the Court for a couple reasons.

And first, let me point -- I agree with Your Honor that there is nowhere in the statute Idaho Code 18-622 that the term "risk" is used with respect to -- that the abortion is necessary to prevent a risk of death of the pregnant woman. Instead, it's abortion is necessary to prevent the pregnant death of a woman.

Your Honor, I believe in that case, Mr. Netter is citing to language that is also citing from Black's Law Dictionary. I don't see any meaningful difference in the position that the State is taking here today with respect to its understanding of 18-622 and the position that it has taken before the Idaho Supreme Court.

You're right, Your Honor, it's a different attorney with that case. But I understand --

THE COURT: You're not throwing someone under the bus, are you?

MR. CHURCH: I am not throwing someone under the bus, Your Honor, because our position, I believe, is consistent

between the two cases. And even then, Your Honor, you know, this is a question of law for this Court if it decides it must interpret Idaho Code 18-622.

Again, the important facet from the State's perspective in this case, Your Honor, is that the United States has not shown in all instances that there is a direct conflict between Idaho Code 18-622 and the Treatment Act. Because there are certainly cases where the abortion was necessary to prevent the death of the pregnant woman, as some of the declarations from the United States' declarants in their original submission made clear.

Now, one -- the second point I had, Your Honor, that I did want to move on to and address was in the United States' response brief, they appeared to make an argument that the State of Idaho was categorically preempted from exercising either civil regulatory or civil sanctioning or criminal sanctioning authority with respect to any stabilizing or any type of treatment that would be offered as a stabilizing treatment. And that's page 19 of their reply brief that I'm looking at.

I would note that if their argument is that there's a categorical rule prohibiting some criminal prohibition of manners of treatment, such as abortion, first, that that would be inconsistent with the savings provision in 1395dd(f). Recall that 1395dd(f) allows every state law requirement to stand unless that state law requirement directly conflicts with a

requirement in EMTALA or the Treatment Act.

Now, with respect to that, Your Honor, my note would be that the case law has established that state malpractice actions, for instance, have been authorized against physicians or providers. Moreover, even the act itself provides for civil regulatory penalty --

THE COURT: Why would a malpractice action create a conflict with EMTALA?

MR. CHURCH: And that's my point. It does not create a conflict.

THE COURT: Here, their argument is that there is a conflict. So why is that apropos to what we're discussing here?

MR. CHURCH: Well, it's apropos because we are contending that there is no conflict in allowing the State to even have a criminal prohibition in the first place.

My understanding is that the United States has raised a categorical argument.

THE COURT: Well, there is no conflict if the criminal prohibition provides an exception that would fall and satisfy the three categories of EMTALA where medical care is necessary even if it includes an abortion.

That's the whole point of this, is whether there is no exception for injury short of death. And it's stated as an affirmative defense in which the burden is on the doctor to prove by a preponderance of the evidence the existence of the

condition -- the circumstance rather than the burden being upon the State to prove beyond a reasonable doubt that it does not exist.

And I can tell you, having presided over hundreds of criminal trials, that is a huge difference. So...

MR. CHURCH: Well, and I appreciate what Your Honor has recognized. And I am just responding to one argument that was made in the United States brief.

But you're right. The United States also contends, as we understand it, that 18-622 -- and this is at pages 7 to 8 of their brief -- that 18-622 is problematic because it places an affirmative defense on the physician and places the burden on the physician to prove that affirmative defense.

Now, I did want to make one note is that, as part of their briefing, the United States cites to the Fetal Heartbeat Act as an example of a law that allows exceptions. And my understanding of the United States' brief is that, under their envisioning, the Fetal Heartbeat Act itself is not in direct conflict with EMTALA or the Treatment Act simply because it has an exception within it.

Now, one additional aside I should note for Your Honor is that the Fetal Heartbeat Act, as of Friday, August 19, did go live and is effective. And it does currently govern physicians within the state. And so physicians within the state are bound by 18-8804 and 18-8805 -- excuse me, Your Honor -- with respect

to the criminal prohibitions that are within 18-8805.

As the Court well knows, though, under 18-622 --

THE COURT: Are you suggesting that the fetal heartbeat law has superseded the criminal abortion statute?

MR. CHURCH: No, Your Honor, but let me clarify that.

So under 18-8805 and I believe it's sub 4, 18-8805 was presumed to go in effect first and has now gone into effect first. When 18-622 became enforceable, at least the criminal provisions of 18-622 became enforceable, that statute, 18-8805, provided that the criminal prohibitions if 18-622 were enforceable would supersede 18-8805's, or the Fetal Heartbeat Act's, criminal prohibitions.

Again, right now, as we stand today, Your Honor, the Fetal Heartbeat Act is effective and it is active within the state of Idaho.

THE COURT: But not in criminal prosecutions?

MR. CHURCH: It is effective with respect to criminal prosecutions, Your Honor.

THE COURT: I thought you just said that the 18-622 said that any contrary provision has to give way to its provisions. Did I --

MR. CHURCH: When 18-622 is enforceable, Your Honor. 18-622 is not effective yet and is not enforceable yet.

THE COURT: Well, as of Thursday, then it will. Is that what you're saying?

MR. CHURCH: As of Thursday, assuming the Court does not enjoin it, it certainly will be enforceable, Your Honor.

THE COURT: Well, I certainly won't enjoin anything more than what the United States has asked, which is enjoin enforcement in the context where EMTALA would require medical treatment.

MR. CHURCH: Correct, Your Honor. And again, if 18-622 is not enforceable in those circumstances, then, by the terms of 18-8805(4), my understanding is that those criminal provisions would be enforceable, the Fetal Heartbeat Act provisions would be enforceable if 18-622 is not enforceable.

But the one thing I think Your Honor -- and Your Honor has hit upon it as well -- is that the difference in this case that's alleged is that there is a difference between Idaho's chosen mechanism of allowing an affirmative defense and allowing a doctor to show good-faith proof that it was a good-faith medical judgment based on the facts known to the physician at or -- at the time that the doctor makes the decision, that the abortion was necessary to prevent the death of a pregnant woman.

Now, under -- in a typical exception case where the prosecutor would bear the burden -- and my understanding with respect to 18-8805 and 18-8804 is that it is based upon an objective standard of whether the -- there was an emergency medical condition, for instance, under those statutes and that it uses an objective standard.

Now, what I don't understand, Your Honor -- and I think this is the point of disagreement between the State and the federal government -- is this: The United States appears to take no issue or have no issue with 18-8804 and 18-8805, the Fetal Heartbeat Act -- which provide for an exception process but still provide for criminal prosecution -- but takes issue and shows -- and says that there is a direct conflict when Idaho has chosen in 18-622 to impose an affirmative defense structure.

There is no good basis, in our -- in the State's view, to view the difference in the burden of proof or the subjective versus objective standard as being in direct conflict with the Treatment Act.

Now, the one case that the United States cites in its reply brief is *Arrington*. And I've had a chance to look at *Arrington*. I understand *Arrington* to be the Ninth Circuit reviewing an agency's -- I believe Health and Human Services' review of a hospital's ambulance diversion policy. It doesn't say anything about criminal liability or that the State is going to be preempted from having a criminal liability that is escapable through an affirmative defense.

There is simply no requirement, Your Honor, in the Treatment Act that, in our view, would be a direct conflict here with respect to a requirement of the Treatment Act and a requirement in 18-622.

Now, Your Honor had asked about the direct conflict

and what that means with respect to the Treatment Act. And, Your Honor, we're bound for these proceedings by the Ninth Circuit's decision in *Draper*, which, as Mr. Netter indicated, determined that the direct conflict means that there would either be -- that it would be physically impossible to comply with both Idaho Code 18-622 in this case and with the Treatment Act, or it would apply in those situations when the entire Act's purpose would be, as we pointed out in our briefing, effectively nullified, is the language from the Ninth Circuit that's used.

And in this case, Your Honor, we certainly don't believe that the standard that the State of Idaho has placed upon physicians to prove an affirmative defense is one that stands as a -- as essentially a nullification of the entire purposes of the anti-dumping Treatment Act.

Now, the last thing I wanted to just touch upon, Your Honor, was with respect to the chilling argument. And contrary to Mr. Netter's representation, we certainly did challenge the assertion that there would be chilling in this case. Let me make a couple points with respect to the chilling.

First, we understood the declarants in their original declarations to make perfectly clear that they could determine when an abortion was necessary to save the life of a mother.

THE COURT: Well, the declarations that you submitted didn't use that terminology. Typically, they indicated that

these were life-threatening and did not, I don't think, directly -- or did they? If they did and you can point that out, I'll stand corrected.

But that was one of the concerns I had, is that the medical declarations from healthcare providers that you submitted consistently referred to these as being clearly life-threatening and, therefore, falling within the affirmative defense.

MR. CHURCH: So just as one example, Your Honor, we only submitted one declaration from a healthcare provider on behalf of the State. This was at 66-1, declaration --

THE COURT: Perhaps it was submitted by the intervenor --

MR. CHURCH: The legislature.

THE COURT: But I'll let Mr. Stewart respond to that.

MR. CHURCH: I do want to make one clarification, though, Your Honor.

We did point out that -- this would be from the declaration of Kraig White, paragraph 4, and this is at page 4 as well. He, for instance, says: "It would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman."

So I believe that's consistent with --

THE COURT: Okay. That's correct. That absolutely is the language at issue here.

MR. CHURCH: But we also understood, and my point, Your Honor, was that the United States -- the federal government's declarants certainly knew and made statements that they were able to determine that a medical abortion was necessary to save the life of the mother, which is the call that 18-622 imposes upon physicians.

Now, with respect to the chilling argument, our understanding of the chilling argument is that physicians -- the United States asserts that physicians would feel chilled simply because there is an apparent conflict or an alleged conflict -- excuse me -- between 18-622 and the Treatment Act.

But we must remember that 18-622 applies in all contexts, not just in the Treatment Act context, but any facet of a physician's practice, you know, including practices outside of the Treatment Act.

And so making that decision that is placed upon physicians to determine whether an abortion is necessary to preserve the life of the pregnant woman is a call that they are going to have to make not just at the emergency room but also in their normal practice to the extent they believe an abortion is necessary in their good faith medical belief and judgment to preserve the life of the pregnant mother.

We would also note, at least for the chilling purposes, Your Honor, that there is just no direct conflict with any particular requirement of the Treatment Act.

THE COURT: Well, let me ask a question about that. And you are about out of the time that you have agreed was a portion of time. I'm going to actually have a question or two to follow up, so I think I will just turn your clock off while I ask those questions.

MR. CHURCH: I appreciate that, Your Honor.

THE COURT: You might not appreciate it when I'm done, but we'll see. I hope your answers will be enlightening because I've got a question that I think points out, at least in my mind, the challenge in how we apply this.

How do we get around the fact that the affirmative defense only deals with conducting an abortion necessary to prevent the death of the patient when the EMTALA talks about having injury to organs adversely affecting -- you know, serious impact upon health? I can't, off the top of my tongue, give you those three elements.

But isn't there just a total impossibility preemption because there is just complete conflict because there is no exception for anything short of an abortion necessary to prevent the death of the patient when EMTALA clearly says you have to be concerned about their health as well?

MR. CHURCH: Well, let me make two points in response to that, Your Honor.

First, I do want to look at the statutory text of the Treatment Act just to make sure we are on the same page as far

as the terms.

And Your Honor cited, I believe, first, the definition of "emergency medical condition," which, as we have all agreed, as provided by the text of the statute to mean "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 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, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." Or there is another provision that applies with respect to a pregnant woman who is having contractions.

THE COURT: Yeah, right. So those were the three. That's exactly the three conditions under EMTALA that I can never rattle off, but you did a nice job of doing that.

MR. CHURCH: But I want to offer one more point, Your Honor, with respect to that.

When a patient is -- when a person goes to the emergency room, has a screening, and that screening determines that there is an emergency medical condition -- which is what we have been just discussing -- that is then the springboard or it starts the process that's required by 49 U.S.C. 1395dd(b)(1) -- well, correction -- well, I'm sorry, Your Honor. I apologize. It's within sub (b) sub (1) that the -- once there is an

emergency medical condition that has been found, it is then up to the hospital, "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."

And the reason why I bring that up, Your Honor, is I want to make sure we're clear on the definition of stabilizing treatment, because stabilizing treatment under provision (e) sub -- it's going to be (e) sub (3) is treatment that is "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."

So I want to make sure, Your Honor, that, you know, stabilizing treatment is not necessarily a cure of an emergency medical condition, Your Honor. It is simply treatment that's necessary to assure that there is no material deterioration within a reasonable medical probability of whatever condition is there.

Now, Your Honor asked about what happens where an abortion is -- a provider determines that abortion is necessary not to prevent the death of a woman, but it would be necessary as some form of stabilizing treatment.

THE COURT: Well, not -- it would be necessary to protect her health, to protect her organs, to protect, you know,

those three standards that EMTALA imposes. That's where my concern is.

In fact, let me -- I'm going to ask -- I've asked Ms. Smith to stop the clock for a minute here. I don't want to take up Mr. Stewart's time. I'm hopeful he appreciates that.

But here, you know, I've tried to think in my mind what kind of portrays where the conflict is. And I thought about, you know, maybe it's being someone who wishes they had been a law school professor, and so I came up with a hypothetical that law professors like to use to try to make points. And I'll throw that at you, and you can tell me how you would respond.

Let's say you're an attorney with a client who is an ER doctor. She calls somewhat in a frantic state because she has got a patient that she is now treating in a very difficult situation; let's say it's preeclampsia. They have tried to control it medically and have been unable to, and the accepted medical practice at that point is an abortion.

Basically, her blood pressure is completely out of control; and in her experience, if the abortion is not performed, there is at least a 50/50 likelihood that she will die.

She also indicates that she is completely risk averse and is not willing to take any chance that she will be prosecuted even though that she might be able to succeed on an

affirmative defense.

So, as her attorney, do you advise her that she can perform the abortion under the statute without any risk of prosecution?

MR. CHURCH: Well, Your Honor, I appreciate the question.

And so with respect to that, just to make sure we're clear, that this would be a situation covered by the Treatment Act to begin with.

THE COURT: Yes. I should have predicated. Yes, absolutely.

MR. CHURCH: So with respect to that, Your Honor, and the current version of Idaho Code 18-622, I, as the lawyer, would advise that -- I would ask questions: Is this necessary to prevent the death of a pregnant woman?

THE COURT: Well, she said it's at least 50 percent. It's a 50/50 proposition.

MR. CHURCH: Well, Your Honor, but I would -- as the lawyer, I would point back to the fact that 18-622 contains no risk or no 50/50 risk requirement or no requirement that the death be imminent or some other temporal requirement. It simply applies where the abortion is necessary to save the life of the pregnant mother.

THE COURT: And she says: I can't answer that; I can just tell you it's 50/50.

MR. CHURCH: Well, then that physician, well, one, could also consider consulting not only with me but with other physicians, or --

THE COURT: She has got a patient that is in critical medical condition; she has to make a decision immediately as to what to do.

MR. CHURCH: Well, Your Honor, you know, as the attorney for the hospital, you can only advise on what the law is. And the law says, under 18-622, that she needs to determine in her good faith medical judgment whether the abortion is necessary to preserve the life of the pregnant mother.

THE COURT: And if she gets it wrong, she is prosecuted, charged, arrested, and has a chance to argue and prove to the jury that her judgment was right; the 50/50 is enough to say that it was necessary to prevent her death? Is that --

MR. CHURCH: I do want to quibble with one last aspect of your point there, Your Honor.

Remember, under 18-622, the affirmative defense that is offered is based on the physician's subjective good faith medical judgment. If the physician can testify and show that it was within her good faith medical judgment to perform the abortion and that the abortion was necessary to save the life of the pregnant woman, then that falls within the affirmative defense of Idaho Code 18-622.

THE COURT: And what if she says, you know, they think they can control it, but there still is a 5 percent chance that she will die. Does that change your advice to the doctor?

MR. CHURCH: No, Your Honor. Because, again, there is no -- not at least from the State's perspective, there is no probability or risk that is part of 18-622. 18-622 just requires that the physician make that determination of whether it's necessary to preserve the life of the pregnant woman.

THE COURT: All right. Well, then the same hypothetical, but she indicates that if the abortion is not performed, the patient will not die, but there is a 90 percent chance she will suffer a stroke, have permanent damage to her vital organs, such as her heart, her liver, or her kidneys.

What's your answer then?

MR. CHURCH: Well, Your Honor, it's the same answer in that you would have -- under Idaho law, the affirmative defense arises under 18-622 when the abortion is necessary to prevent the death of the pregnant woman.

THE COURT: So you would tell her she cannot perform that abortion, or she would be facing criminal liability?

MR. CHURCH: Your Honor, I would just be advising as to what the statute says, Your Honor.

But I would note for purposes of this case, Your Honor, that because this is a facial challenge, there are still circumstances where, you know, 18-622 and the Treatment

Act can be applied. And that's a reason why we should deny the United States' requested preliminary injunction relief in this case.

THE COURT: Okay. So basically, as an attorney, you'd simply tell the doctor, your client: This is what the statute says, and I can't tell you whether you will be prosecuted or not, but the risk is that this is what the statute provides?

And I assume you would agree that in the last part of my hypothetical where there is no risk of death, but there is a substantial risk of serious impact upon her health -- organs failing, permanent damage to those organs, maybe a stroke -- that in that situation, the statute would not apply and would not provide an affirmative defense.

MR. CHURCH: Your Honor, I'm only bound by what 18-622 provides.

THE COURT: Okay. Well, that's why I'm asking. Do you agree that 18-622 would not provide an affirmative defense in that situation?

MR. CHURCH: If the -- if the physician cannot testify in her good faith medical belief that she believed the abortion was necessary to preserve or prevent the death of the pregnant woman, then the affirmative defense would be inapplicable in that case, Your Honor.

THE COURT: All right. And she would be subject to criminal prosecution and face a minimum two years in prison?

MR. CHURCH: Subject to what I have just said, yes, Your Honor.

THE COURT: Okay. All right. Thank you.

Anything else? I will let you make a few parting shots before we hear from Mr. Stewart, if there is anything else you want to add.

Counsel, I know the hypothetical -- I remember from law school that we sometimes think that professors are being unfair, but usually they are doing it to try to point out kind of where the cutting edge is.

And that's the reason I did that, is to try to see how a real-life attorney dealing with a real-life doctor dealing with a real-life pregnant patient, how they are to confront the statute in an emergency room setting. And that's why I asked the questions that way.

You gave a very lawyerly response, which is: This is what the statute provides and wouldn't provide guidance beyond that.

But is that troublesome in terms of EMTALA compliance?

MR. CHURCH: I don't think so, Your Honor. Because, again, I'm not certain that there is a direct conflict here that is presented.

THE COURT: Even in the context where it's not life-threatening?

MR. CHURCH: Well, even if there could be a conflict,

Your Honor, again, in the State's position, this is a facial challenge.

THE COURT: All right.

MR. CHURCH: And we would have to show -- the United States would have to show that in all instances, 18-622 conflicts with the Treatment Act.

Our position is they clearly haven't shown that, Your Honor. And for these reasons, we would ask that you deny preliminary injunctive relief requested by the United States.

THE COURT: Well, thank you.

MR. CHURCH: Thank you, Your Honor.

THE COURT: Thank you, Mr. Church.

Mr. Stewart.

MR. STEWART: Your Honor, Monte Stewart along with Daniel Bower representing the Idaho legislature.

Here is my answer to your hypothetical: That doctor calls me from the emergency room or, more accurately, from an extension of the emergency room, which would be up in labor and delivery, which is where these emergencies really do play out.

And, yes, EMTALA does apply in labor and delivery; it's not limited physically to the emergency room.

That doctor calls me and gives me the 50/50 hypothetical. I tell her: You go right ahead, and you use your best medical judgment, and you can do so without fear of prosecution.

Now, I can do that and put my legal malpractice insurance policy on the line and do so without the slightest heartburn or without ever second-guessing myself.

Because in the real world, in the real world -- and I'm speaking to you as someone who has prosecuted cases in state court and as someone who, as an employee of the United States Department of Justice, as the United States Attorney for the District of Nevada, has prosecuted cases and knows how prosecutors think: In the real world, there will not be a prosecution. And Grant Loebs certainly backs me up.

Now, you then try to -- you then moved to make the hypothetical more challenging where you eliminated the risk of death. And you, I think, were trying to use some language from EMTALA itself, from the definition of "emergency medical condition" -- "serious impairment to bodily functions, or serious dysfunction of any bodily organ or part."

Now, subpart (2) and subpart (3) -- I think I can help. And this is going to help through the remainder of the time you give me. May -- with the leave of the Court, may Mr. Bower pass out a packet to Court and counsel, law clerks, if that's okay, with just a few documents in it?

THE COURT: What is it you want the Court to look at?

MR. STEWART: The first document is actually the Government's proposed preliminary injunction order. The second one is the page from EMTALA that I am referring to. And the

third document is an exercise I went through regarding the proper scope of any injunction if you decided to go in that direction.

And, of course, the legislature believes the only proper order is motion denied, but I think it's helpful in this factual context to address that.

THE COURT: Why don't you put that on the evidence presenter.

MR. STEWART: What's that?

THE COURT: If you could just put that on the evidence presenter, it might be easier. We could possibly even -- I don't know if we can bring it on for those in the audience, but...

MR. STEWART: Can you see this or just the audience?

THE COURT: I'm supposed to be able to see it.

Well, all right. Yeah, I can now. It's up on my screen. I don't know if we are able to show it to the --

MR. STEWART: Given my age, I'm low-tech. That's why I brought paper copies for everyone.

THE COURT: I am not low-tech, and I prefer -- okay. I think we have got it. Go ahead.

MR. STEWART: Okay. Well, if you'll see here, subpart (2) and subpart (3) are the ones I just read to you. And that's what I heard you saying --

THE COURT: That's not precisely --

MR. STEWART: -- in that second hypothetical. Is that correct?

THE COURT: Well, I was not trying to capture it precisely, but that was the point.

MR. STEWART: But the general idea, yes.

I would give the same answer with the same absence of any heartburn.

THE COURT: So you are saying there is no risk of prosecution --

MR. STEWART: Because there is another affirmative defense in the real world. And that is assuming -- and I'm not conceding anything -- you have limited me to talk about the actual conflict which is the fact-intense issue here. In talking only about that, I am honoring your directive to me.

THE COURT: Okay. Well, I think what you're saying is that prosecutors will not actually prosecute under these circumstances.

MR. STEWART: Right, because there is an affirmative defense under the Government's own position --

THE COURT: Just a moment. Just a moment, Mr. Stewart.

But there is not an affirmative defense as to the three categories that we listed here, because the statute doesn't provide an affirmative defense where it is just health-threatening as opposed to necessary to prevent the death

of the mother.

MR. STEWART: Yes. 622 doesn't provide it, but EMTALA does.

THE COURT: But that's the point, is EMTALA is in conflict with -- or at least the Government is arguing that EMTALA is in conflict with a federal statute which criminalizes providing an abortion as a medical treatment if it is not necessary to preserve the mother's life.

MR. STEWART: Exactly right.

Your Honor, let me step back and tell you that there is a gulf between Mr. Netter and Mr. Stewart. Mr. Netter's approach is highly conceptual, highly textual, highly abstract. Mr. Stewart's approach is real life, real world, and practical.

THE COURT: Well, isn't real world -- I noted that Mr. Netter referred to the comment made during the debates that led to the adoption of the Idaho abortion statute in which an effort was made to apparently include some protection for the situation where the pregnant patient's health is at risk.

And the response was: Well, in that situation, the right of the fetus should be primary.

Are you saying there are no prosecutors out of 44 counties in the state of Idaho that might not take that same position?

MR. STEWART: Let me take the easiest case first.

Idaho is capable of many things, but it is not capable

of producing now or in the future a prosecuting attorney stupid enough to prosecute an ectopic pregnancy case. The first thing the doctor --

THE COURT: I didn't ask about an ectopic specifically.

Just generally, given the attitude or the expression of legislative intent which Mr. Netter referenced during his oral argument, are you saying there is no prosecutor, in the 44 counties in the state of Idaho, who would take the position that where it is only necessary to protect the health of the mother -- I keep using the word "mother" -- health of the pregnant patient, that should give way to the rights of the unborn fetus?

MR. STEWART: The answer to that, Your Honor, is that this legislation is designed to balance this state's determination of the moral value of the preborn child on one hand and the often weighty, weighty and even heart-wrenching interests of the mother -- I won't hesitate to use the word -- on the other hand. And this is where, in the exercise of its constitutional right, the State of Idaho has drawn the line.

What I'm trying to get across here, Your Honor -- because you're being asked to issue an injunction that carves back against Idaho's judgment and to do so on the basis of one federal statute, EMTALA. And we have talked about the conflict.

It is a fact-intensive conflict. I would like to point out something extremely important, the single-most important thing I can say to you right now in the time given me.

If you will look at the EMTALA language that's up on the screen, you will see there is a subpart (1): "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."

There is congressional language expressing a congressional intent to protect and preserve the mother and the child equally -- not one above the other, equally.

Why I have that in yellow and why this is the most important thing I can tell you is because of the language the Department of Justice wants you to use in any preliminary injunction order.

They have used -- and this is the first document in the packet. They have used -- after distorting the language of subpart (1), they have used the subpart (1) language in the proposed order. They even preserve the subpart (1) numeral, but they don't quote it truthfully and fully and honestly, "placing the health of a pregnant patient in serious jeopardy."

In other words, Your Honor, please, they have taken congressional language, the purpose -- the clear meaning of which, the clear purpose and intent of which is to protect the unborn child from serious injury, serious jeopardy, serious

health problem. And they are writing that language after they have taken out any reference which they never gave you anywhere in their papers -- any reference to the "unborn child." They are using that language --

THE COURT: Just a moment, Mr. Stewart. Just a moment.

The conflict here is between a state statute permitting an abortion -- excuse me -- criminalizing an abortion even where the abortion would be necessary to preserve the health and ensure no injury to -- permanent injury to organs, et cetera. How or why should the requested relief in any way reflect a concern for the health of the unborn fetus? Because we're talking about an abortion where the choice has been made where there is no balancing at that point.

MR. STEWART: Because your authority extends to the boundary of the conflict and no further. You can enjoin 622 to the extent of a conflict; perhaps only conceptual, hypothetical, abstract conflict, because we have shown there is no actual one. But that's the limit of your authority to enjoin enforcement and operation of 622.

So what is the boundary of that conflict? It's discernment by 622 on one hand but certainly by EMTALA on the other hand. You can't say that 622, with its intent to protect the life of the child, conflicts with subpart (1), which is Congress's intent to protect the child.

You don't have the "unborn child" reference in subpart (2) and subpart (3). And that's why it would be entirely wrong to use subpart (1) language in any preliminary injunction order, because you're going outside the scope of what Congress intended.

Why is the Government trying to shoehorn in this subpart (1) language? Well, I submit, in all due respect, that it's to keep the administration's political promise to push back against *Dobbs* and to restore, to the extent possible, under the powers of the executive branch.

I would ask leave of the Court to submit a redline -- it's actually blue on this document --

THE COURT: Counsel, your time is almost up.

MR. STEWART: I understand that. This is the most important thing I can do.

THE COURT: All right. I'm just letting you know. So go ahead.

MR. STEWART: Yes. Thank you.

-- to submit a proposed what we call a fallback order -- we are not consenting or agreeing or conceding anything -- but that carefully, carefully defines what it is that is being enjoined and carefully limits the injunction to its only proper basis, which is the actual conflict based on EMTALA.

And that's part of that packet that I requested leave

to submit. We can submit it after the hearing is over if you prefer.

THE COURT: Well, the concern during oral argument is the Government needs a chance to respond. So I don't know -- is there a reason why it couldn't have been submitted in advance?

MR. STEWART: Well, it's only because we only very recently realized what the Government was doing with this subpart (1).

THE COURT: Well, I don't think there is any secret here --

MR. STEWART: Misuse of subpart (1) --

THE COURT: Just a moment, Mr. Stewart.

There is no secret about it. You put up the complaint, or at least the proposed order. I don't think there is too much surprise about that.

What is it you want the Court to consider?

MR. STEWART: A blue-line of the Government's proposal order which --

THE COURT: Well, you're --

MR. STEWART: -- puts in the proper limitations that it does not contain.

THE COURT: You're over time now, but let me just ask it this way: So are you saying that because of the language in EMTALA at subparagraph (1) that you cite, that this indicates that Congress has indicated that no abortion can be performed

because that would, by definition, be inimical to the life and health of the fetus?

MR. STEWART: What I'm saying to the very best of my ability, Your Honor, is that that language, subpart (1) language, cannot be used to increase the risk of jeopardy to the health of the unborn child because its purpose is to do the opposite.

THE COURT: So, really, you are saying that if we have a situation where an abortion is necessary to preserve the health of the mother, then, in that situation, EMTALA would still preclude that abortion because it does not take into account the life of the unborn fetus?

MR. STEWART: What I'm saying -- yes. Well, let me say it this way: Subpart (2) and subpart (3) set a standard.

By the way, the Fetal Heartbeat Act echos sub (2) and sub (3). That's why the Government didn't challenge it, even though it is now in effect and has criminal provisions equally onerous.

THE COURT: But it doesn't -- as I suggested with Mr. Church, it does not supersede 622. 622 is still and will be in effect come Thursday.

MR. STEWART: No, it will not be in effect if you enjoin its operation.

THE COURT: No, no, no. Without an injunction. I mean, I thought that was obvious from my question.

MR. STEWART: Right, right, right. But, of course, what I'm saying is --

THE COURT: No, no. My question is: It will still be in effect; the fetal heartbeat law will not supersede or in any way affect the Section 622 coming into effect on Thursday?

MR. STEWART: That's correct. The superseding language is actually in the Fetal Heartbeat Act itself, which was enacted later, a year later than the --

THE COURT: No. You answered my question.

MR. STEWART: Yes.

THE COURT: You're well over your time. If you want to submit it, I'll look at -- I'll give you a minute to very quickly summarize the argument you are going to make with this, and then I'll --

Mr. Netter, if you, after looking at it, feel the need to respond, I may give you a chance to submit a very short, maybe one- or two-page response since you have not seen this in advance. Or if you think you can look at it quickly and incorporate that into your argument, you can do that as well.

MR. NETTER: Thank you, Your Honor.

THE COURT: Mr. Stewart, just a minute to wrap up before I turn the time back to Mr. Netter.

MR. STEWART: In the real world, there is no conflict. I'm not disputing, Your Honor, the conceptual textual conflicts, but what matters is what happens in the real world.

And I believe the factual demonstration is very strong that there is no actual conflict between the operation of 622 and the operation, within its intended and proper scope, of the -- of the EMTALA language, especially because -- and this is my last sentence -- my doctors whom I respect greatly tell me that they have never encountered a case falling within subpart (2) and subpart (3) where the health of the mother -- excuse me -- the life of the mother was not in danger and threatened and likely to occur.

The Government has not given you one concrete example of that --

THE COURT: Did you read Dr. Corrigan's --

MR. STEWART: Yes.

-- other than -- other than ectopic pregnancies.

And you have known our position for weeks. The legislature had no intent, because as our doctors told us -- one of the first things they told us: What? No. An ectopic pregnancy is not an abortion. Why? Because it will never result in a live birth, and it will always put --

THE COURT: Excuse me, Counsel. Counsel, just a moment. That's not the definition of "pregnancy," nor is it the definition of "abortion" under the statute.

MR. STEWART: Well, again -- again, the conceptual as opposed to the real world and the practical. My clients are real-world, practical folks.

THE COURT: All right. Thank you.

Mr. Netter.

MR. NETTER: Your Honor, let me start with a quick administrative note.

THE COURT: Yes.

MR. NETTER: To make it easier for the Court to locate the representation by the State in the Idaho Supreme Court proceedings as to what the affirmative defense means, I want to provide a more specific citation because the filings are a bit difficult to navigate.

It's in Case No. 49817. It is a document entitled "Respondents' Response to Order Setting Hearing," and it's at page 14.

THE COURT: I would note I understood Mr. Church is not in any way running away from that statement. I think he was pretty clear that the language necessary to prevent the death of the pregnant patient means what it says and says what it means.

And I appreciate his candor that -- I don't think he ran away from that, and I think he apparently took roughly the same position that his colleague in the Attorney General's Office took before the Idaho Supreme Court. But I appreciate that, and I will look at that.

Go ahead.

MR. NETTER: I don't disagree, Your Honor. I also understood Mr. Church to be attempting to faithfully interpret

the statutory text.

My only point of departure would be that Mr. Church said that he was not troubled in the circumstance that the 50/50 hypothetical with the prospect that there could be a criminal violation or criminal prosecution; whereas with reference to EMTALA, I see that as deeply problematic and, from a moral standpoint, extremely objectionable.

Now, the State's primary arguments here seem to rest on the *Salerno* issues as to whether or not, as a technical matter, the challenge presented by the United States is a facial challenge.

To be clear, this is not a facial challenge that has been filed by the United States. A facial challenge would be if we had said: Here is one defect we have identified; and as a result, the entire statute falls.

Our challenge is tailored to the circumstances in which EMTALA applies. So every time EMTALA mandates care, Idaho law must yield.

Now, I thought I understood Mr. Church to be saying also that perhaps it's okay, that maybe this can be litigated later, or perhaps there is, like, an affirmative defense that can be raised in criminal proceedings stemming from EMTALA. And that last point might have been from Mr. Stewart.

So I want to be clear on this: That the injury to the United States takes place sooner. That the issue here is, as

the physicians have told us in their declarations, there will be hesitancy to comply with federal law.

The federal interest here is in ensuring that the benefit of the bargain -- the federal law -- in ensuring that the emergency care that is prescribed by EMTALA is actually delivered.

And if there are circumstances in which a doctor hesitates, in which a doctor has to call the lawyers and get a legal opinion because it seems like Idaho law might be violated or has to speak with Mr. Stewart about his sense of whether, despite the statutory text the prosecutor is going to bring the charges, this is all in conflict with EMTALA and federal law, which requires the care to be offered at the point where it's necessary.

Now, Mr. Stewart said in this context that Idaho has drawn its line. And I want to be clear that our position is that Idaho doesn't get to draw a line that conflicts with EMTALA.

Federal law has prescribed a standard to the extent of any direct conflict -- which, in this context, means impossibility or obstacle preemption -- federal law governs. And Idaho doesn't have the prerogative, under the supremacy clause of the U.S. Constitution, to draw its own distinct line.

So Mr. Stewart just brought up the statutory language about "unborn child." And I'll say first that I don't believe

that this issue is properly before the Court. It was not raised in the papers. Indeed, both the State and the legislature indicated that they agreed that there were circumstances under which EMTALA would require abortions as a stabilizing treatment.

I understood Mr. Stewart's argument to be, because of this "unborn child" language in the statute that, in fact, the opposite is true. And that position has surely been forfeited.

In any event, that interpretation of the statute, the interpretation of the statute that I think Mr. Stewart was intimating at, is just not correct.

The "unborn child" language did not appear in EMTALA as it was originally adopted. It was incorporated through an amendment that was adopted in 1989. There is nothing in the text or in the statutory history that suggests that Congress was trying to prohibit emergency abortions in some extremely roundabout fashion.

Instead, it appears that it occurred to somebody that there could be an emergency condition pertaining only to a fetus; and that if a pregnant individual appeared at a hospital and she was herself healthy but had a fetal condition, that the hospital should be providing treatment under the same circumstances.

Now, none of this suggests that emergency abortions have somehow become unlawful or unnecessary under EMTALA. Indeed, it is meaningful that the requirement under EMTALA is

not for the doctor to actually perform a particular treatment but for the hospital to offer the treatment and to discuss the pros and cons, the risks and the benefits of the treatment. And if after that discussion of the risks and benefits, the patient refuses to provide informed consent for the procedure, then that's the patient's prerogative.

And we have seen in some of the declarations that it does sometimes happen; that when doctors make recommendations about medical care, patients think otherwise.

There are some other indications, too, post the 1989 amendment, that suggest that Mr. Stewart's potential interpretation of the "unborn child" language doesn't work.

We noted in our opening brief that Congressman Weldon, the author of the Weldon Amendment -- which is designed to protect from discrimination institutions that decline to provide abortions -- in the legislative history of the Weldon Amendment in 2005, Representative Weldon was asked: Why doesn't your amendment mean that when women are experiencing life-threatening conditions, that they will be effectively dying on the operating table?

And his response, coming from the perspective of somebody who was trying to empower institutions that decline to provide abortions, was that EMTALA would govern in those circumstances and that nothing in his amendment would preclude the provision of that lifesaving care under federal law.

Likewise, through the Affordable Care Act in 2010, 42 U.S.C. 18023, Congress provided circumstances under which a state can exclude abortions from the health plans that are offered on the marketplace in the state. And in so doing, Congress explicitly recognized that nothing in the Affordable Care Act was designed to overcome the provisions of EMTALA in that context.

Mr. Church also brought up the heartbeat law. He suggested that we had endorsed the exception to the heartbeat law. And I just want to make clear that we haven't done so.

The fact that we haven't expressly challenged the exception in the heartbeat law doesn't mean that we have blessed that particular formulation, particularly in light of the fact that, under our reading of 18-8804 and -8805, that law is effectively to expire later this week.

I was having a hard time understanding if Mr. Church was suggesting that the heartbeat law could survive to the extent this Court were to enjoin the Total Abortion Ban.

We certainly don't read 18-8804 and 18-8805 to provide that avenue. It says if the Total Abortion Ban becomes enforceable -- which it would even if it's enjoined to the extent that it's in conflict with federal law -- that the heartbeat law would no longer be in effect.

Your Honor, I want to go back to the point that Mr. Stewart made suggesting that the statutory text doesn't

matter here, effectively, because he knows what prosecutors think.

I have no way to gauge whether or not he truly understands how the prosecutors in each county of this state think or how the voters are going to think about prosecutors they are going to elect in the future or how members of a grand jury might think before taking a complaint to a magistrate.

But the question here is how doctors are going to evaluate the statute. And we submitted in the declarations explanations from the doctors about the horrifying situation that they anticipate will result from the full implementation of the Total Abortion Ban.

The other point about Mr. Stewart's representation and the practicalities matter is the Court should take this as an enormous concession. If the legislature, and potentially the State, are taking the position that the text of the statute isn't real, then that means the text of the statute isn't lawful.

And the role of a court of law in that context is to enjoin the impermissible operation of a law which will cause drastic effects and dramatic consequences for pregnant individuals in the state of Idaho and for physicians and for medical providers.

So unless the Court has further questions --

THE COURT: No.

MR. NETTER: -- we would ask the Court to enter the preliminary relief requested in our motion.

THE COURT: Thank you, Mr. Netter.

Counsel, I intend to issue a written decision in this matter. My best guess is we won't have it done until Wednesday, possibly tomorrow, but our plan is no later than Wednesday since the law takes effect on Thursday.

I will offer just one or two observations. I am having a hard time seeing how this is an as-applied challenge where there is clearly a very narrow and, as I think, frankly, Mr. Stewart has argued, a very rare, in his view, perhaps nonexistent threat, but it's certainly in very limited circumstances where the abortion statute would be precluded.

I hope I made clear: It seems to me it's clearly an as-applied challenge, and I have a hard time seeing how this could be a facial challenge.

Another thought that I think I do want to observe. Mr. Stewart has made a great deal that we should focus on the real-world events and not on the text, the conceptual language of the statute.

The concern is, of course, that real-world events are very hard to predict. The text of the statute is very easy to read and understand. And I think the case law is absolutely clear that it is the text that matters and that we don't -- judges are not issued some kind of a crystal ball when

they're appointed to the bench that allows them to see what the facts are, but we are generally trained in interpreting the case, the statutory language.

And I think this case kind of underscores why the case law is clear that we do need to look at the text in determining whether there is a conflict between federal law and state law.

Simply put, doctors in emergency rooms and labor and delivery rooms around this state are going to be forced to navigate their way through this conflict between the abortion statute and EMTALA. I think it is not much comfort to a doctor in that there is a sitting prosecutor who they think will not enforce it, but no one knows for sure.

And importantly, the text matters in terms of impacting the decisions made by those doctors when they confront a life-or-death situation involving a pregnancy that has gone horribly wrong.

So I think in terms of determining preemption, we have to look at the statute. And I have a very hard time seeing how we can compare the abortion statute as we think it may be applied to what EMTALA requires when we certainly can't rule out the possibility that it will, indeed, be enforced.

Indeed, the legislature would not have adopted the law unless they intended that it would be enforced according to the exact terms that they set forth. I don't think our legislature ever intends a law thinking that it will not be enforced

according to its terms.

And that's why I think the law is clear that that's what we look at; we look at the statutory language. We don't guess about what a prosecutor will or won't do. And I think I'll just leave it at that.

So there are some other concerns I've got. I've tried to point those out at the outset in my questioning. We will issue a written decision. I think, without any doubt, it will be filed no later than Wednesday so we have a clear guidance one way or the other before the statute takes effect.

Is there anything else, Counsel?

MR. NETTER: No, Your Honor.

MR. STEWART: No, Your Honor.

MR. CHURCH: Nothing from the State, Your Honor.

THE COURT: Then we'll be in recess.

(Proceedings concluded at 10:50 a.m.)

REPORTER'S CERTIFICATE

I, TAMARA I. HOHENLEITNER, CSR, RPR, CRR, certify that the foregoing is a correct transcript of proceedings in the above-entitled matter.

/s/ Tamara I. Hohenleitner 08/24/2022
TAMARA I. HOHENLEITNER, CSR, RPR, CRR Date

Nos. 23-35440 & 23-35450

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THE STATE OF IDAHO
Defendant,
v.
MIKE MOYLE, Speaker of the Idaho House of Representatives; et al.,
Intervenors-Appellants

Appeal from the United States District Court
for the District of Idaho
Honorable B. Lynn Winmill
(1:22-cv-00329-BLW)

IDAHO LEGISLATURE'S EXCERPTS OF RECORD
VOLUME 4 OF 4

Monte Neil Stewart
11000 Cherwell Court
Las Vegas, NV 89144
Telephone: (208) 514-6360
monteneilstewart@gmail.com

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

Counsel for Intervenors-Appellants

EXHIBIT 3

under this subchapter for violations related to the appropriateness of a medical screening examination, stabilizing treatment, or an appropriate transfer as required by this section, and shall provide a period of 5 days for such review. The Secretary shall provide a copy of the organization's report to the hospital or physician consistent with confidentiality requirements imposed on the organization under such part B.

(4) Notice upon closing an investigation

The Secretary shall establish a procedure to notify hospitals and physicians when an investigation under this section is closed.

(e) Definitions

In this section:

(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,

(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.

(2) The term “participating hospital” means a hospital that has entered into a provider agreement under section 1395cc of this title.

(3)(A) The term “to stabilize” means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability,

EXHIBIT 2

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

[PROPOSED/FALL-BACK] ORDER

Upon consideration of the United States' Motion for a Preliminary Injunction, and the parties' respective submissions in support thereof and in opposition thereto, the Court hereby grants the United States' motion to the extent set forth below and otherwise denies it.

It is ORDERED that the State of Idaho, including all of its officers, employees, and agents, are preliminarily enjoined from enforcing Idaho Code § 18-622(2)-(3) to the extent, but only to the extent, that such enforcement will actually prohibit, preclude, or unduly interfere with medical treatment (i) that is provided "to stabilize" (within the meaning of the Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd(e)(3)(A)) and (ii) that is provided in a "hospital" (within the meaning of EMTALA, 42 U.S.C. § 1395dd(e)(5)). As used in the previous sentence, "enforcing" and "enforcement" mean and encompass only actual conduct the purpose and effect of which is to threaten or prosecute any criminal proceeding against or attempt to suspend or revoke the professional license of any medical provider or hospital based on their provision of medical treatment constituting an "abortion" (within the meaning of Idaho Code § 18-

604(1)) when, but only when, that treatment is of an "emergency medical condition" (within the meaning of EMTALA, 42 U.S.C. § 1395dd(e)(1)) and the withholding of that treatment "could reasonably be expected to result in— … serious impairment to bodily functions or … serious dysfunction of any bodily organ or part" of "a pregnant woman" (within the meaning of EMTALA, 42 U.S.C. § 1395dd(e)(1)(A)(ii)-(iii)).

SO ORDERED.

EXHIBIT 1

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

[PROPOSED/FALL-BACK] ORDER

Upon consideration of the United States' Motion for a Preliminary Injunction, and the parties' respective submissions in support thereof and in opposition thereto, the Court hereby grants ~~ORDERS that the~~ the United States' motion ~~is GRANTED~~ to the extent set forth below and otherwise denies it.~~.~~

It is ~~FURTHER~~ ORDERED that the State of Idaho, including all of its officers, employees, and agents, are preliminarily enjoined from enforcing Idaho Code § 18-622(2)-(3) to the extent, but only to the extent, that such enforcement will actually prohibit, preclude, or unduly interfere with medical treatment (i) that is provided "to stabilize" (within the meaning of ~~as applied to medical care required by~~ the Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C. § 1395dd(e)~~d~~(3)(A)) and (ii) that is provided in a "hospital" (within the meaning of EMTALA, 42 U.S.C. § 1395dd(e)(5)).~~.~~ As used in the previous sentence, "enforcing" and "enforcement" mean and encompass only actual conduct the purpose and effect of which is to threaten or prosecute

~~It is FURTHER ORDERED that the State of Idaho, including all of its officers, employees, and agents, are specifically prohibited from initiating~~ any criminal proceeding~~secution~~ against~~,~~ or attempt~~ing~~ 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 provision of medical treatment constituting ~~performance of conduct that is defined as~~ an "abortion" (within the meaning of ~~under~~ Idaho Code § 18-604(1)) when, but only when, that treatment is of an "emergency medical condition" (within the meaning of EMTALA, 42 U.S.C. § 1395dd(e)(1)) and the withholding of that treatment "could reasonably be expected to result in— …~~, but that is necessary to avoid: (i) "placing the health of" a pregnant patient "in serious jeopardy"; (ii) a "~~serious impairment to bodily functions or … ~~" of the pregnant patient; or (iii) a "~~serious dysfunction of any bodily organ or part~~"~~" of "a ~~the~~ pregnant woman" (within the meaning of EMTALA, ~~patient, pursuant to~~ 42 U.S.C. § 1395dd(e)(1)(A)(ii)-(iii)).

SO ORDERED.

~~//end of text//~~

~~Submitted by: Lisa Newman~~
~~Counsel for the United States~~

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 OBJECTION TO THE GOVERNMENT'S PROPOSED ORDER

As referenced in today's hearing, 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"), without making any concession or waiving any argument (see below), has identified the over-reach of the United States' Proposed Order, Dkt. 17-2, and corrected it with "red-line" edits that limit the injunctive relief to the scope of EMTALA when properly read and applied in light of the Government's own theory. Hence, this filing, including its exhibits, constitutes the Legislature's Objection to the United States' Proposed Order.

Attached Exhibit 1 reflects those "red-line" edits (albeit in blue).

Attached Exhibit 2 is the same as Exhibit 1 after all edits have been accepted and are no longer shown in blue.

Attached Exhibit 3 contains relevant portions of EMTALA.

By making this filing, the Legislature does not make any concession contrary to or waive any argument in support of its position that this Court cannot, under the governing legal and equitable principles and in light of the admissible, credible evidence before the Court, enter any injunction at all.

Dated this 22nd 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 22nd 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

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

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

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

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
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) 514-5578
lisa.n.newman@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 **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

The conflict between Idaho's abortion ban and EMTALA is clear from the plain language of the Idaho law and the testimony from multiple local physicians explaining how Idaho's law will prevent critical medical care for pregnant patients in emergency conditions. Idaho could have designed a law allowing patients with emergency conditions to obtain necessary care. Instead, the State enacted a law that permits the prosecution of any physician who performs any abortion, even as a life-saving treatment. The State focuses on the law's affirmative defense, which can be raised only at trial, and only then if abortion is "necessary" to prevent death. But even where the affirmative defense seemingly applies, it does not eliminate the risk for physicians or their patients. And the scope of the affirmative defense is insufficient when compared to EMTALA's requirements. Without an injunction against § 18-622's enforcement, physicians will be faced with an untenable choice and pregnant patients in Idaho will be put in danger.

There is no dispute that EMTALA's requirement to offer "stabilizing treatment" applies to pregnant patients, nor is there any dispute that some pregnant patients will present at a hospital with an emergency medical condition for which pregnancy termination is the necessary stabilizing treatment. Both the State of Idaho and the Idaho Legislature have filed briefs and submitted declarations expressly acknowledging that EMTALA requires hospitals to offer termination of the pregnancy as potential stabilizing treatment under relevant circumstances.

Instead, Defendants argue that § 18-622 does not actually conflict with EMTALA's requirements. But Defendants' factual submissions—about how they understand the term "abortion" and how they believe doctors should decide when to perform an emergency abortion—cannot be reconciled with the Idaho law's statutory text, which criminalizes all abortions (no matter how medically necessary or life-saving), and allows medical professionals to avoid criminal liability only by proving an affirmative defense that is narrower than what EMTALA requires. Under well-settled

preemption principles, § 18-622 conflicts directly with EMTALA. And based on the significant irreparable harm that would be caused if § 18-622 were allowed to go into effect, particularly for pregnant individuals in Idaho and the United States' sovereign interests, the United States is entitled to a preliminary injunction against § 18-622's enforcement, as applied to EMTALA-mandated care.

ARGUMENT

I. The United States Has Authority to Bring this Suit and Seek Injunctive Relief

Before turning to the preemption issues at the heart of this case, the State obliquely raises several threshold issues regarding the United States' authority to bring this suit. None has merit, and the standard for facial challenges is likewise no impediment to entering relief here.

A. The United States Has Standing and a Cause of Action

The State of Idaho alludes to "questions . . . that eventually may require resolution" regarding the United States' standing and cause of action for this suit, Idaho Br. at 7-8, but then expressly disclaims seeking a ruling on those arguments for purposes of this motion. Regardless, the State's arguments are meritless. It is "beyond doubt" that the United States suffers an "injury to its sovereignty arising from violation of its laws," *Vt. Agency of Nat. Res. v. U.S. ex rel Stevens*, 529 U.S. 765, 771 (2000), which is precisely what is alleged in this case with respect to § 18-622. And the Ninth Circuit has held that the United States has standing when a state or local law "proscribe[s] some activity encouraged by federal law." *United States v. City of Arcata*, 629 F.3d 986, 989 (9th Cir. 2010); *see also United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (holding, in the context of a Supremacy Clause claim, that "an alleged constitutional infringement will often alone constitute irreparable harm"), *rev'd in part on other grounds*, 567 U.S. 387 (2012). Section 18-622 interferes with Congressional policy as reflected in EMTALA, and the United States may sue to enforce those Federal interests. *See Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) ("Our decisions have established, too, the general rule that the United States may sue to protect its interests."); *United States v. Alabama*, 691

F.3d 1269, 1301 (11th Cir. 2012); *United States v. Arlington Cnty.*, 326 F.2d 929, 931-32 (4th Cir. 1964).

Moreover, if § 18-622 is allowed to go fully into effect, it will have widespread public health consequences for countless pregnant patients within Idaho. *See* US Br., Dkt. 17-1 at 17-19; *see also* Dkt. 59 at 15-17 (discussing interstate harms). The Supreme Court long ago recognized the United States' authority to sue to redress injuries to the general welfare: "Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other[.]" *In re Debs*, 158 U.S. 564, 584 (1895). That is not a matter of third-party standing, *see* Idaho Br. at 7-8, but rather the United States asserting its own interest in preventing widespread public harm.

Idaho's law also deprives the United States of the benefit of its bargain in connection with Medicare funding provided to hospitals within Idaho. That funding was expressly conditioned on Idaho-based hospitals' compliance with EMTALA, *see* 42 U.S.C. § 1395cc(a)(1)(I)(i), and Idaho law now prohibits such compliance. Thus, § 18-622 harms "the administration and integrity of Medicare," *United States v. Mackby*, 339 F.3d 1013, 1018 (9th Cir. 2003), which the State agrees is a cognizable injury. *See* Idaho Br. at 8. The State contends that there are no State-operated hospitals with an emergency department participating in Medicare, *see id.*, but the terms of Spending Clause legislation are enforceable against state laws that interfere with recipients' obligations. *See Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) (holding that state law is preempted to the extent it interferes with third parties' compliance with conditions attached to federal funds); *cf. United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 609 (5th Cir. 1980) (recognizing that "the United States has an inherent right to sue for enforcement of the recipient's obligation in court"); *United States v. Mattson*, 600 F.2d 1295, 1299 n.6 (9th Cir. 1979). In any event, there are fifteen *county*-owned hospitals participating in Medicare that *do* have emergency departments. *See* Wright Decl., Dkt. 17-9 ¶ 9. Thus,

the United States can sue to enforce the benefit of its bargain under Medicare.

In terms of a cause of action, the State expresses uncertainty based on *Armstrong v. Exceptional Child Ctr. Inc.*, 575 U.S. 320 (2015), *see* Idaho Br. at 7, but *Armstrong* confirms the United States' cause of action here: there is an equitable cause of action allowing suit "to enjoin unconstitutional actions by state and federal officers," which is a "creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 575 U.S. at 327. Nothing more is needed, as confirmed by the numerous recent lawsuits brought by the United States challenging state laws under the Supremacy Clause, none of which was dismissed for lack of a cause of action.[1]

Finally, the State suggests that EMTALA's "detailed remedial scheme" precludes a cause of action. But EMTALA does not contain a process for prospective enforcement against states that criminalize care required by federal law. Rather, the enforcement regime is after-the-fact, and pertains only to physicians and hospitals who have committed "negligent[]" or "gross and flagrant" violations of EMTALA's requirements. 42 U.S.C. § 1395dd(d)(1)(A), (B). Even where it does apply, nothing in EMTALA suggests that its enforcement scheme was intended to *circumscribe* the inherent authority of the United States to enforce its rights in equity. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 270-71 (1947) (even when statute limits remedies, that generally does not apply to the United States based on the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect").

B. This Case Is Not a Facial Challenge, and As-Applied Relief Is Appropriate

Idaho also attempts to portray the United States' preemption claim as a "facial challenge" to § 18-622, suggesting that the United States cannot meet that standard for relief. Idaho Br. at 10 (citing

[1] *See, e.g.*, *United States v. Washington*, 142 S. Ct. 1976 (2022); *Arizona*, 567 U.S. at 387; *City of Arcata*, 629 F.3d at 989; *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 899 (10th Cir. 2016); *Alabama*, 691 F.3d at 1301; *United States v. Colo. Supreme Ct.*, 87 F.3d 1161, 1165 (10th Cir. 1996); *United States v. South Carolina,* 840 F. Supp. 2d 898, 908 (D.S.C. 2011), *aff'd*, 720 F.3d 518 (4th Cir. 2013); *United States v. Texas*, 557 F. Supp. 3d 810, 820 (W.D. Tex. 2021).

Puente Arizona v. Arpaio, 821 F.3d 1098 (9th Cir. 2016), and *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010)). But the United States is not asking this Court "to enjoin enforcement of all applications" of § 18-622 or "strike down the law[] in [its] entirety," "in all contexts as applied to all parties." *Puente Arizona*, 821 F.3d at 1105, 1108. To the contrary, the United States is seeking an injunction against the enforcement of § 18-622 only as applied to EMTALA-mandated care. *Cf.* Compl., Prayer for Relief. Moreover, the United States is not seeking relief "beyond the particular circumstances of these plaintiffs." *John Doe*, 561 U.S. at 194. Instead, the United States is seeking relief necessary to redress its *own* injuries— *i.e.*, relief to protect against the public harms caused by the inconsistency of § 18-622 and federal law.

In any event, even if the standard for facial challenges applied, the State offers no reason why the United States would be unable to meet it here with respect to the class of conduct at issue: EMTALA-mandated care. *See Arizona*, 641 F.3d at 345-46 (holding that the *Salerno* "formulation misses the point: there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause"). Indeed, the Ninth Circuit has had no trouble applying typical (non-*Salerno*) preemption principles where, as here, the plaintiff attacks a statute as applied to a subset of conduct or individuals. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Su*, 41 F.4th 1147, 1153 (9th Cir. 2022) ("As applied to [plaintiffs'] railroad employees, the [California] Act falls within RUIA's preemption clause."). Under typical preemption principles, Idaho cannot prohibit through § 18-622 medical care that is required to be provided under EMTALA, and § 18-622 is invalid in all of its applications as applied to that swath of conduct.

II. The United States Has Established a Likelihood of Success on Its Preemption Claim

Neither the State nor the Legislature meaningfully disputes that, as a legal matter, EMTALA sometimes requires abortion as a stabilizing treatment. The only question is whether Idaho law stands in the way of that federally mandated medical care. It plainly does. Under § 18-622, all abortions in Idaho expose physicians to criminal prosecution—even when provided in life-threatening situations.

Defendants nowhere grapple with the fact that subjecting medical providers to criminal prosecution for care that is required under federal law creates a direct conflict with that federal law. And while Defendants emphasize the law's affirmative defense—which does not eliminate this fatal flaw—even that affirmative defense is, by its plain text, narrower than EMTALA.

A. There Is No Meaningful Dispute That, As A Legal Matter, EMTALA Sometimes Requires Abortions as Stabilizing Treatments

Both the State and the Legislature expressly acknowledge that EMTALA sometimes requires a physician to offer an abortion when it is the stabilizing treatment for an emergency medical condition. *See* Idaho Br. at 12-13 ("the United States merely identifies circumstances when stabilizing treatment necessitated by EMTALA includes an abortion"); Legisl. Br. at 10 ("'[I]n the emergency situations . . . 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.'" (quoting French Decl., Dkt. 71-5 ¶ 9)); *see* US Br. at 8-14. Thus, there is no meaningful dispute here about what federal law requires.

Despite Defendants' (and their declarants') acknowledgment of what EMTALA requires, they refer without elaboration to "legal arguments" suggesting the United States' interpretation is incorrect. Legisl. Br. at 13; Idaho Br. at 19 n.10. These undeveloped arguments have been waived, *see Indep. Towers v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003), and in any event are meritless.

First, the "major questions doctrine" is not implicated here because EMTALA is a requirement for emergency care that Congress itself imposed, over 35 years ago, on hospitals receiving federal funds. The major questions doctrine applies "in certain extraordinary cases" when there is an affirmative *agency* regulatory action involving "major policy decisions." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (describing "the major questions doctrine" as arising only in "extraordinary cases" involving "*agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted" (emphasis added)). This case involves no assertion of agency authority, and instead the United States is enforcing a "policy decision[]" made by "Congress . . . itself[.]" *Id.*

Second, EMTALA does not violate the Spending Clause. Congress is free to attach conditions to federal funds, *see South Dakota v. Dole*, 483 U.S. 203 (1987), and there is nothing impermissibly coercive about this arrangement because "[o]nly hospitals that voluntarily participate in the federal government's Medicare program must comply with EMTALA." *Burditt v. Dep't of Health & Human Servs.*, 934 F.2d 1362, 1376 (5th Cir. 1991). A decision to participate in Medicare by an individual provider—the vast majority of which are private entities, for whom the "coercion" doctrine does not apply, *see Northport Health Servs. of Arkansas, LLC v. Dep't of Health & Hum. Servs.*, 438 F. Supp. 3d 956, 970–71 (W.D. Ark. 2020)—is fundamentally different from a State's participation in Medicaid, distinguishing this case from *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); *see also Jones v. Wake Cnty. Hosp. Sys., Inc.*, 786 F. Supp. 538, 547 (E.D.N.C. 1991) (upholding EMTALA under the Spending Clause). And Congress's decision to condition Medicare participation on compliance with EMTALA is no different than numerous other longstanding conditions. *Cf. Biden v. Missouri*, 142 S. Ct. 647, 650-51 (2022). In sum, there is no meaningful dispute about what federal law validly requires—under EMTALA, when patients present to emergency departments with emergency medical conditions, covered hospitals must sometimes offer abortion as a stabilizing treatment.

B. Idaho's "Total Abortion Ban" Prohibits Care that EMTALA Requires

The Supreme Court of Idaho has described § 18-622 as a "Total Abortion Ban." *Planned Parenthood Great Nw. v. Idaho*, --- P.3d ---, 2022 WL 3335696, at *1 (Idaho Aug. 12, 2022). In attempting to argue that there is no direct conflict between a federal law that requires abortion care and Idaho's law criminalizing such care, both Idaho and the Legislature fail to recognize that § 18-622 contains *no* textual exception to its "crime of criminal abortion," for example, in medically necessary situations. That means that a prosecutor who indicts a physician for "criminal abortion" need not make any showing about medical necessity in order to support a felony conviction. The State equates the law's *affirmative defense* with an *exception* to the law's criminal prohibition, but these concepts are markedly

different. Under the Idaho law, any physician who provides any abortion is subject to disciplinary proceedings, criminal prosecution, and a burden of proof. That would not be the case under a law containing an exception from the prohibition itself. The State knows how to write a law allowing exceptions for some abortions but chose not to employ that structure here. *See* Idaho Code § 18-8804(1) (prohibiting certain abortions "except in the case of a medical emergency"); *id.* § 18-505 (similar); *id.* § 18-604(9) (defining "medical emergency"). Because Idaho's Total Abortion Ban contains no exceptions, EMTALA and § 18-622 directly conflict, and Defendants' attempt to rewrite the statute through litigation filings and factual declarations should be rejected.

Importantly, neither the State nor the Legislature disputes that, to the extent § 18-622 imposes criminal liability on conduct that federal law requires, § 18-622 is preempted. *See* US Br. at 15. Instead, both Defendants try to avoid that result by misconstruing Idaho law—suggesting that Idaho's criminal prohibitions do not apply to life-saving care, and implying that the affirmative defense is co-extensive with EMTALA's requirements. These arguments are incorrect both legally and factually.

1. Idaho's Abortion Prohibitions Apply Even to Life-Saving Care

The Legislature (but not the State) argues that life-saving care is not considered an "abortion" under Idaho law, and therefore such care falls outside Idaho's criminal prohibitions. The Legislature presses this argument primarily for ectopic pregnancies, *see* Legisl. Br. at 6-7, but its declarants contend that life-saving care is *never* considered an abortion. *See* French Decl. ¶ 14; Reynolds Decl. ¶ 12.

To be clear, the United States agrees that treatments for ectopic pregnancy and other life-saving care are not considered "abortion" *in the medical community*. *See* US Br. at 7 n.1; Fleisher Decl., Dkt. 17-3 ¶ 3. What is material to this case, however, is how *Idaho law* defines "abortion" in the relevant statutes: "'Abortion' means 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). Neither the Legislature

nor its declarants ever address this statutory text, which contains no exceptions for pregnancy terminations necessary to save someone's life or where the pregnancy is nonviable. Regardless of what the medical community considers to be an abortion, therefore, the text of Idaho's abortion laws clearly extends to life-saving pregnancy terminations. *See Worley Highway Dist. v. Kootenai Cnty.*, 576 P.2d 206, 209 (Idaho 1978) ("This Court has consistently adhered to the primary canon of statutory construction that where the language of the statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction.").

Indeed, with respect to ectopic pregnancies specifically, there can be no doubt that they are included within the statutory definition of "abortion," given that Idaho law expressly defines "pregnancy" to mean "the reproductive condition of having a developing fetus *in the body* and commences with fertilization." Idaho Code § 18-604(11) (emphasis added). The statutory references to "the body" rather than "the uterus," and "fertilization" rather than "implantation," indicate that ectopic pregnancies are included. And the Legislature knows how to exclude an ectopic pregnancy when it wants to. *Id.* § 18-617(1)(a). Again, the Legislature has no answer to this statutory text.

The Legislature's only textual argument on this issue refers to § 18-622(4), which provides: "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." *See* Legisl. Br. at 6-7 (contending that this provision "specifies the health of the woman is of primary importance"); French Decl. ¶¶ 15, 21. But this provision explicitly addresses only *accidental* or *unintentional* harm to a fetus; it does not address terminating a pregnancy for life-saving reasons, which even the Legislature's physicians agree is both medically necessary and will *intentionally* end the pregnancy. *See* Reynolds Decl. ¶ 14; French Decl. ¶ 17; White Decl. ¶ 3. This provision cannot be construed as a catch-all for life-saving care, particularly given the statute's more specific provision governing treatment to prevent death. *See* Idaho Code § 18-622(3)(a)(ii); *Valiant*

Idaho, LLC v. JV LLC, 429 P.3d 168, 177 (Idaho 2018) (noting the "basic tenet" that "the more specific statute or section addressing the issue controls over the statute that is more general").[2] Thus, § 18-622's text confirms that it extends to every termination of a pregnancy, regardless of whether the abortion is a life-saving one or whether the procedure would typically be considered an "abortion" within the medical community. The Legislature cannot avoid preemption by re-writing its laws in a legal brief to exclude certain actions from the criminal prohibitions. *See Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 265 P.3d 502, 508 (Idaho 2011) ("We must follow the law as written. If it is socially or economically unsound, the power to correct it is legislative, not judicial.").

Finally, Idaho's theory about how its law works in practice is belied by the actual experience of medical professionals in Idaho who regularly treat women in these situations: emergency care normally provided to pregnant patients is proscribed by § 18-622, which will hinder their ability to provide that care if the law goes into effect. *See* Corrigan Decl. ¶¶ 31-35; Cooper Decl. ¶12; Seyb Decl. ¶ 13. Tellingly, Defendants nowhere grapple with these practical realities. They merely point to declarants who state—without basis or support, and without regard for the plain text of Idaho's law—that no reasonable physician should fear prosecution in Idaho for performing emergency abortions.

2. The Idaho Law's Affirmative Defense Is Narrower than EMTALA Because It Applies Only When Necessary to Prevent Death

The United States' opening memorandum and declarations demonstrated that there are numerous emergency medical conditions under EMTALA for which a doctor might conclude that the necessary stabilizing treatment is termination of the pregnancy, but where termination would not

[2] Dr. French asserts that life-saving terminations of pregnancy cause only "unintentional" harm to the unborn child, because "the intent of the procedure is to save the life of the mother; it is an unintended consequence of the procedure that the baby dies." French Decl. ¶ 14. As this Court previously recognized, however, the scope of § 18-622 is a legal question, not a factual issue for which Dr. French's testimony is relevant. *See* Dkt. 73 at 3. And as a legal matter, Idaho criminal law generally does not require that a person specifically intend the consequences of their actions, only that they have "a purpose or willingness to commit the act" itself. Idaho Code § 18-101(1).

fall within the Idaho law's affirmative defense because it may not be "necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3)(a)(ii); *see* US Br. at 9-11, 15; Fleisher Decl. ¶¶ 12-27. In response, both the State and the Legislature try to avoid a conflict between EMTALA and § 18-622 by arguing that every single one of those conditions was "life-threatening," such that it was permissible under Idaho law for the pregnancy to be terminated. *See* Idaho Br. at 11-13; Legisl. Br. at 7-8; White Decl. ¶ 2 ("It is my opinion that every one of the five examples provided by Dr. Fleisher present a life-threatening situation."); *see also* French Decl. ¶¶ 29-30; Reynolds Decl. ¶ 7.

As an initial matter, even if § 18-622's affirmative defense were understood to apply to "life-threatening conditions," that still would not resolve the obvious textual conflict between § 18-622's narrow defense and EMTALA's much broader definition of when treatment is required, *i.e.*, for an emergency medical condition that could result in "placing the health of the individual . . . in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395dd(e)(1)(A). That textual discrepancy alone is sufficient to conclude that the two statutes directly conflict and thus § 18-622 is preempted as to EMTALA-required care.

Even setting that aside, however, this argument fails on its own terms. The premise of the argument is that, under § 18-622, it is lawful to perform an abortion in response to a "life-threatening condition." But that is not what the statute's affirmative defense says—it applies when "the abortion was *necessary to prevent the death* of the pregnant woman." § 18-622(3)(a)(ii) (emphasis added). Neither the State nor the Legislature provides a basis for equating "necessary to prevent . . . death" with "life-threatening," and the phrases clearly have different meanings.

First, "necessary" is a definite term whereas "threatening" expresses a possibility. When engaging in statutory interpretation, the Idaho Supreme Court "begins with the dictionary definitions." *Idaho v. Clark*, 484 P.3d 187, 192 (Idaho 2021). As the Idaho Supreme Court has recognized, "'[n]ecessary' means 'indispensable.'" *City of Pocatello v. Peterson*, 473 P.2d 644, 648 (Idaho 1970) (citing

Black's Law Dictionary). Merriam-Webster similarly defines "necessary" as "absolutely needed: Required." *Necessary*, Merriam-Webster Dictionary Online, https://perma.cc/4DNK-AVJC. By contrast, the word "threatening"—as in the case of a "life-threatening" condition—is not nearly as definite. *See Life-Threatening*, Black's Law Dictionary (11th ed. 2019) ("Of, relating to, or involving illness, injury, or danger that could cause a person to die"); *Threatening*, Merriam-Webster Dictionary Online, https://perma.cc/TPH7-XPCE (defining "threatening" as "expressing or suggesting a threat of harm, danger"; "indicating or suggesting the approach of possible trouble or danger"). A condition that *threatens* a patient's life may not *necessarily* result in death in the absence of an abortion, which confirms that § 18-622's affirmative defense is narrower than the State's portrayal and EMTALA.

Indeed, the surrounding statutory context confirms that "necessary to prevent . . . death" was not intended to overlap with "life-threatening conditions," let alone EMTALA's scope. The Idaho Legislature has proven that when it wants to provide a broader exception for abortions—beyond just those "necessary to prevent . . . death"—it knows how to do so. For example, § 18-8804(1) prohibits certain abortions "except in the case of a medical emergency," which is defined to mean a condition "necessitat[ing] the immediate abortion of [a woman's] pregnancy to avert her death *or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function*." Idaho Code § 18-8801(5) (emphasis added). Idaho's twenty-week ban on abortions contained a very similar exception, *see id.* § 18-505, as does the definition section applicable to § 18-622 itself. *See* Idaho Code § 18-604(9).

The Legislature's deliberate choice to allow for an affirmative defense only where "necessary to prevent the death" of the pregnant person—and not, for example, in a "medical emergency" as defined in § 18-604(9)—demonstrates that the Legislature intended for the affirmative defense in § 18-622 to apply in a narrower set of circumstances. *See Idaho v. Yager*, 85 P.3d 656, 666 (Idaho 2004) ("Where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different

intention existed."). Indeed, the Legislature conceded as much in its intervention motion—highlighting that § 18-8801(5) "has a broader definition of 'medical emergency' than does the 622 Statute," and the Legislature viewed that broader definition as being more in line with EMTALA, Dkt. 15-1 at 2, which means that the narrower version in § 18-622 does *not* align (and directly conflicts) with EMTALA.

Thus, the plain text of § 18-622's affirmative defense is narrower than EMTALA and does not even encompass care in "life-threatening situations" as the State suggests. In cases where a patient has a medical condition requiring abortion that seriously threatens the patient's health but is not yet *guaranteed* to result in their death, EMTALA requires such care whereas § 18-622 prohibits it, which means § 18-622 is preempted as applied to such care.

3. Factually, the Affirmative Defense Does Not Cover All EMTALA-Protected Abortions

Even if the affirmative defense extended to abortions provided in "life-threatening situations" as the State and Legislature suggest, § 18-622 would still conflict with EMTALA. Federal law authorizes stabilizing treatment—including, in some situations, abortions—not just when necessary to prevent death, but also where necessary to prevent "placing the health of the individual … in serious jeopardy," "serious impairment to bodily functions," or "serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395dd(e)(1)(A); *see* US Br. at 15. Both Defendants argue that the United States has failed to demonstrate that abortions are provided when there is a serious risk to health, bodily functions, or organs—but not to a pregnant person's life—and, thus, that there is no actual conflict between federal and state law. *See e.g.*, Idaho Br. at 12-13; Legisl. Br. at 7-8. But that is incorrect.

First, the State, the Legislature, and their declarants suggest that a bright line exists between an emergency medical condition where a patient's health or bodily functions are in danger and one where her life is at risk. *See, e.g.*, Idaho Br. at 12; Legisl. Br. at 7 (citing French Decl. ¶¶ 17-29, 30-55; Reynolds Decl. ¶ 7). But "[l]ife and health exist on a fragile and shifting continuum." Dkt. 62 at 16; *see*

also Fleisher Supp. Decl. ¶ 7, Ex. H; Corrigan Supp. Decl. ¶¶ 8-10, Ex. I. As Dr. Fleisher explained in his original declaration, "in 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." Fleisher Decl. ¶ 12; *see also* Huntsberger Decl. ¶¶ 8-11, Ex. J. EMTALA requires stabilizing treatment based on that threat to health, *see* 42 U.S.C. § 1395dd(b)(1)(A), (e)(1)(A); but Idaho law requires the physician to wait until she is comfortable that there is sufficient evidence to convince a jury that termination of pregnancy is "necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3)(a)(ii). That is a clear conflict between state and federal law, and "EMTALA does not allow leaving the patient untreated when doing so would irreparably risk or harm their health." Fleisher Decl. ¶ 12. When abortion is the stabilizing treatment, that care should be provided "rather than waiting to see if and/or when the patient's condition worsens to the point that they are about to die[.]" Fleisher Supp. Decl. ¶ 7; *see also* Huntsberger Decl. ¶¶ 12-15; Corrigan Supp. Decl. ¶¶ 8-13.

Second, Defendants are incorrect that, as a factual matter, interpreting the affirmative defense to mean "life-threatening" would cover all pregnancy terminations covered under EMTALA. *See* Idaho Br. at 11; Legisl. Br. at 8. Their declarants do not dispute that termination of pregnancy could be the appropriate stabilizing treatment for any example provided by the United States' declarants, *see* Part II.A, *supra*; rather, they assert that the abortions performed were necessary to save the patient's life. Setting aside these declarants' overbroad (and atextual) interpretation of the affirmative defense, their arguments disregard the actual statements in the declarations.

Dr. Fleisher, for example, described several conditions that—although they *could* be life-threatening for certain patients—may involve only threats to health, organs, or bodily functions for other patients. *See* Fleisher Decl. ¶ 15 (heart failure could threaten "impairment or severe dysfunction of bodily organs (such as the lungs, heart, and kidneys)"), ¶ 17 ("eclampsia can cause coma, pneumonia from the aspiration of stomach contents, kidney failure"), ¶ 19 (septic infection "can lead to kidney

failure"), ¶ 21 ("uncontrolled bleeding" can "result in organ dysfunction such as kidney failure"); *see also* Corrigan Supp. Decl. ¶ 8. The State's and Legislature's version of the affirmative defense—allowing treatment only in threats to *life*—still prohibits treatment that EMTALA requires, *i.e.*, when an emergency medical condition poses some of these threats to health but may not yet result in a threat to life. *Cf.* Fleisher Decl. ¶ 23 (discussing "[h]ow emergency conditions present in a pregnant patient will often vary depending on the patient's specific circumstances"). Indeed, Dr. Fleisher's supplemental declaration further elaborates on one such concrete example: a patient diagnosed with preterm premature rupture of membranes (PPROM), which currently threatens bodily functions and organs (*e.g.*, her uterus and future fertility), but which would not yet constitute a life-threatening condition. *See* Fleisher Supp. Decl. ¶ 6.

The Idaho providers, moreover, addressed similar situations. Dr. Cooper, for instance, described a situation in which Jane Doe 1 presented to the hospital with fetal triploidy and preeclampsia with severe features. Cooper Decl., Dkt. 17-7 ¶ 6. The patient was "at risk for stroke, seizure, pulmonary edema, [and] development of HELLP syndrome," but rather than wait for her life to be in jeopardy, Dr. Cooper recommended termination of the pregnancy "to stop her disease progression." *Id.* EMTALA permitted her to take that action when there was only a risk—at that moment in time—to her health, bodily functions, and organs; contrary to Defendants' position, she did not wait until the situation deteriorated further to become life-threatening, and EMTALA would not have allowed her to do so. *See also* Cooper Supp. Decl. ¶ 3, Ex. K.

Further, Dr. Cooper's and the other supplemental declarations make clear that, consistent with EMTALA, physicians in Idaho perform "abortions" before emergency medical conditions deteriorate into life-threatening ones. As with Dr. Fleisher, Dr. Cooper explains PPROM can initially present in a variety of different ways, some of which may only involve threats to health, organs, and bodily functions but which still require stabilizing treatment. Cooper Supp. Decl. ¶ 5. Similarly, the need to

treat preeclampsia "is not always to prevent death" but may be "to avoid further deterioration, physical harm, and threat to future fertility and long-term health." *Id.* ¶ 3. Dr. Huntsberger also explains that many ectopic pregnancies are treated by prescribing methotrexate to end the pregnancy without need of surgical intervention, because surgery greatly increases the risk of rupturing the fallopian tube and by extension decreasing fertility. Huntsberger Decl. ¶ 12. Predicting when an ectopic pregnancy will result in rupture of the fallopian tube is not ordinarily possible, and for that reason, physicians act immediately to resolve the emergency medical condition when it presents as a threat to the patient's health and organs rather than her life. *See id.* ¶¶ 11, 13.

Pregnant patients seek treatment for these emergency medical conditions in emergency departments throughout Idaho, and under federal law, covered hospitals must offer stabilizing treatment for conditions that endanger a patient's health. Idaho's affirmative defense does not extend to that care, however, even under Defendants' atextual and overbroad interpretation. Section 18-622 is accordingly in direct conflict with EMTALA by prohibiting care that EMTALA requires.

C. Idaho Law Conflicts with EMTALA By Allowing Prosecution and Disciplinary Proceedings for All Abortions Regardless of Circumstances

Additionally, § 18-622 directly conflicts with EMTALA because, regardless of the scope of the law's affirmative defense, that affirmative defense structure *itself* stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," in violation of EMTALA's preemption provision. *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993).

Notably, neither the State nor the Legislature disputes that § 18-622 allows medical professionals to be indicted, arrested, and criminally prosecuted for *every* abortion, regardless of the abortion's circumstances. The Legislature tries to salvage the law by resorting to notions of prosecutorial discretion. *See* Legisl. Br. at 9-10; Loebs Decl., Dkt. 71-6. But this argument concedes that § 18-622 criminalizes life-saving care, because the "necessary to prevent . . . death" standard has been relegated to an affirmative defense. *See, e.g.*, *United States v. Sisson*, 399 U.S. 267, 288 (1970) ("It

has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses."); *Idaho v. Barton*, 297 P.3d 252, 255 (Idaho 2013); *Idaho v. Segovia*, 457 P.2d 905, 908 (Idaho 1969). Thus, even though both the Legislature and State accept that termination of pregnancies is medically necessary for a range of conditions, they nonetheless concede that each time a physician performs that "heroic life-saving surgery," French Decl. ¶ 33, the physician remains subject to indictment, arrest, and criminal prosecution—a clear conflict with EMTALA's text and purpose of *requiring* such medical care. *Arrington v. Wong*, 237 F.3d 1066, 1073-74 (9th Cir. 2001). It is of little comfort to a physician, whose freedom and livelihood are on the line, that the Legislature claims in its briefing that some prosecutors may not fully enforce Idaho's much-touted new law. Corrigan Supp. Decl. ¶ 14; Huntsberger Decl. ¶ 20; Cooper Supp. Decl. ¶ 9.

Even on its own terms, the Legislature's reliance on prosecutorial discretion fails. The Legislature has submitted a single declaration from a single county prosecutor, who obviously lacks authority to bind any of the other 43 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 Code § 19-1108 (grand juries); *Idaho v. Murphy*, 584 P.2d 1236, 1241 (Idaho 1978) (citizen complaints); § 18-622(2). More fundamentally, the Ninth Circuit has expressly held that officials' "promise of self-restraint does not affect our consideration of the ordinances' validity" under preemption doctrine. *City of Arcata*, 629 F.3d at 992; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882 (2000) ("[T]his Court's pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations . . . or how likely it is that state law actually would be enforced.").

The State, for its part, does not deny that every provider is subject to disciplinary proceedings and prosecution even when they provide life-saving care, and instead tries to defend the law indirectly. First, the State contends that there is no "direct conflict" because it remains possible for physicians to

comply with both § 18-622 and EMTALA. Idaho Br. at 15. But that is inconsistent with the Ninth Circuit's interpretation of EMTALA's preemption provision as extending to a "state law [that] is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Draper*, 9 F.3d at 1393. Here, § 18-622's affirmative defense structure poses an obstacle to EMTALA-required care—because even when federal law *compels* a physician to provide such care, the physician still risks indictment, arrest, pretrial detention, and a trial where the physician bears the burden of proof on this critical issue, all under threat of a felony conviction with a minimum two-year sentence. For those physicians "faced with the obligation to comply with [Idaho's] law and left only with an affirmative defense," before providing care they are forced to ask: "Is any risk of death sufficient? Must the risk be greater than 50%? 75%?" Corrigan Supp. Decl. ¶ 14. That alone frustrates EMTALA.

Second, the State argues for a presumption against preemption "in a field which the States have traditionally occupied." Idaho Br. at 15. But when a "statute contains an express pre-emption clause," as EMTALA does here, "we do not invoke any presumption against pre-emption." *Puerto Rico v. Franklin Calif. Tax-Free Tr.*, 579 U.S. 115, 125 (2016); *see also Sabri v. United States*, 541 U.S. 600, 608 n.* (2004) (federal spending power applies with equal force when Congress legislates "in an area historically of state concern").

Third, the State disputes the "chilling effect" experienced by medical providers, pointing out EMTALA's civil liability provisions. *See* Idaho Br. at 16. But those civil liability provisions apply only if a hospital *fails* to provide EMTALA-mandated care, *see* 42 U.S.C. § 1395dd(d)(2)(A), so it is unclear what relevance they have to evaluating the chill caused by § 18-622, which *prohibits* such care and exposes such care to criminal prosecution. If anything, those civil liability provisions only highlight the impossible position facing providers because of § 18-622. Moreover, the "chill" here is well-documented both factually and legally. Several Idaho-based providers have confirmed that, because of § 18-622, the threat of prosecution would interfere with the timely provision of medically necessary

and ethically appropriate care for their patients. *See* Corrigan Decl. ¶¶ 31-35; Corrigan Supp. Decl. ¶ 11; Cooper Decl. ¶ 12; Cooper Supp. Decl. ¶¶ 7, 9; Seyb Decl. ¶¶ 13-14; Huntsberger Decl. ¶¶ 19-20.[3] And legally, the threat of civil and criminal sanctions for engaging in conduct required by federal law is more than enough to establish obstacle preemption. *See Chamber of Commerce of U.S. v. Bonta*, 13 F.4th 766, 781 (9th Cir. 2021) ("much like a state may not 'prohibit[ ] outright'" conduct protected by federal law, a state likewise cannot "impose civil or criminal sanctions on individuals or entities for the act" encouraged by federal law); *see also Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982) (state law is preempted if it "places irresistible pressure on a private party to violate [federal law] in order to comply with the statute"); *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 239 (1967).

At bottom, § 18-622 represents a substantial obstacle to providing the emergency medical treatment required by EMTALA and is therefore preempted. The availability of an affirmative defense, to be proven at a criminal trial, by a preponderance of the evidence, does not alleviate this conflict.

III. The Equitable Balance Confirms an Injunction Is Warranted

As previously discussed, the balance of the equities underscores that preliminary injunctive relief is appropriate here. A preliminary injunction will prevent widespread harm to pregnant patients within Idaho, protect Congress's public policy choice, and preserve the integrity of the Medicare program. Meanwhile, § 18-622 is not (and never has been) in effect. Enjoining that law's application to a subset of federally mandated medical care will cause no tangible harm to Idaho.

Throughout its brief, the Legislature describes the threatened denial of medical care to patients as a mere "thimble" that is "empty." Legisl. Br. at 2-3, 8. Under federal law, however, *every* person is

[3] The Legislature tries to dispute the validity of this "chill" through Dr. Reynolds's declaration, in which she states that "[n]either I nor, in my opinion, any practicing Ob-Gyn would reasonably fear criminal prosecution under the 622 Statute" in circumstances that necessitate "an emergency medical procedure necessary to preserve the life of the mother." Reynolds Decl. ¶ 14. Dr. Reynolds—a Nevada-based doctor—is not competent to testify about Idaho-based physicians' fears of prosecution under Idaho law. *Cf.* Corrigan Supp. Decl. ¶ 3. And Dr. Reynolds nowhere acknowledges that § 18-622 contains only an *affirmative defense* for abortions necessary to prevent death.

guaranteed emergency care within EMTALA's scope, and § 18-622's prohibition of such emergency care—even if applicable only to a single person—is sufficient to establish a violation of the Supremacy Clause and, consequently, irreparable harm. *See Arizona*, 641 F.3d at 366 (recognizing that establishing a Supremacy Clause violation also establishes irreparable harm).

The Legislature relies on "statistics" purportedly showing that only five emergency abortions have occurred in recent years. *See* Legisl. Br. at 8. Of course, even that showing would be enough for irreparable harm. Regardless, as the Legislature admits, their statistical categories are so circumscribed that they say *nothing* about emergency medical conditions requiring termination of the pregnancy for the vast majority of individuals. *Cf. Idaho Vital Statistics - Induced Abortion 2020*, Idaho Department of Health and Welfare (Jan. 2022), Ex. L, at 10, 14 (confirming that the Legislature's statistical categories are essentially an empty set).

Finally, the State argues that it is simply "regulating abortion through a criminal statute of general applicability," which does not "regulat[e] Medicare or the hospitals' participation in Medicare." *Id.* at 18-19. Regardless of the validity of Idaho's law generally, however, it interferes with the integrity of Medicare by criminalizing medical care that, as a condition of receiving federal funding, covered hospitals are required to offer. And the generality of the State's law does not change that, with respect to EMTALA-required care, the law directly conflicts and therefore is invalid under the Supremacy Clause. Given the lack of any tangible harm to Idaho from a temporary injunction against § 18-622's enforcement as to EMTALA-required care, the equitable balance confirms that a preliminary injunction is warranted here.

CONCLUSION

For the foregoing reasons, the Court should enter a preliminary injunction prohibiting the State of Idaho—including all its officers, employees, and agents—from enforcing Idaho Code § 18-622(2)-(3) as applied to EMTALA-mandated care.

Dated: August 19, 2022

Respectfully submitted,

SAMUEL R. 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

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
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) 514-5578
lisa.n.newman@usdoj.gov

Counsel for Plaintiff

Erica Evancic

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U.S. District Court

District of Idaho (LIVE) NextGen 1.6

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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 4

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 **DECLARATION OF PROSECUTING ATTORNEY GRANT LOEBS**

DECLARATION

I, Grant Loebs, being first duly sworn under oath, state and depose upon personal knowledge as follows:

1. I have served as the Prosecuting Attorney for Twin Falls County since 1997.

2. I am familiar with The Emergency Medical Treatment and Labor Act ("EMTALA") that generally requires "stabilizing treatment" to incoming patients, including pregnant patients, experiencing an "emergency medical condition." *See* 42 U.S.C. § 1395dd(b)(1). Similarly, I am familiar with the obligation of hospital emergency departments to comply with EMTALA as a result of receiving Medicare.

3. I am also familiar with Idaho abortion law, Idaho Code § 18-622, set to take effect August 25, 2022.

4. In my opinion, Idaho Code § 18-622 ("622 Statute") as written does not preclude life-saving procedure or other similar procedures when required under EMTALA. 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.

5. Assuming a serious medical condition requires an emergency medical procedure under EMTALA, and that such procedure ends the life of the pre-born child, in the exercise of my prosecutorial discretion I would not second-guess the judgments and decisions of the attending medical professionals and would not consider prosecuting anyone under the 622 Statute in such a case. Unless I had proof beyond a reasonable doubt that the procedure was performed in bad faith and that the emergency was fabricated to evade the 622 Statute under the guise of EMTALA, no charges would be filed under the 622 Statute.

6. I have reviewed the various circumstances and scenarios presented by Dr. Corrigan (Dkt. 17-6), Dr. Cooper (Dkt. 17-7) and Dr. Seyb (Dkt. 17-8) in their respective August 8, 2022, declarations.

7. I would not prosecute any health care professional based on facts like those set forth in those declarations, and I believe no Idaho prosecuting attorney would do so. Indeed, it is as though the scenarios set forth in the affidavits of Drs. Corrigan, Cooper, and Seyb were specifically designed to illustrate cases where prosecution would NOT be pursued.

8. Under Idaho Code § 18-622, medical professionals (physicians, physician's assistants, pharmacists, nurses, and anesthesiologists) would NOT be committing a criminal act when they perform or assist in performing an abortion necessary to prevent the death of the pregnant woman. Therefore, as an elected prosecutor, I would not pursue prosecution in such situations.

9. Under Idaho Code § 18-622, medical professionals (physicians, physician's assistants, pharmacists, nurses, and anesthesiologists) would NOT be committing a criminal act when they perform or assist in performing procedures to stabilize the health of a mother which

accidentally result in the death of a pre-born child. Therefore, as an elected prosecutor, I would not pursue prosecution in such situations.

10. Medical professionals should not hesitate or delay in providing stabilizing life care due to a fear of prosecution under the 622 Statute.

11. I believe that the opinions I have stated above regarding prosecutorial discretion and the application of the 622 Statute are shared by all prosecuting attorneys in Idaho.

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is to the best of my knowledge true and correct.

August 17, 2022
Date

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-329 **DECLARATION OF RICHARD SCOTT FRENCH, M.D.**

I, Dr. Richard Scott French, declare as follows:

1. I graduated from Harbor-UCLA Emergency Medicine Residency in June 1986. After completing my residency in Emergency Medicine, I joined the faculty of Stanford University Medical School as a full-time assistant professor in the Department of Surgery, Division of Emergency Medicine, in July 1986.

2. Since that time, I have held full-time teaching faculty positions at Stanford University Medical School and University of North Carolina Medical School.

3. I have also held several part-time clinical faculty teaching appointments, including at the University of Washington, Oregon Health Systems University, University of Alabama, and Emory University.

4. In my teaching capacities, I have given presentations to medical students, interns, and residents on normal and abnormal labor and delivery, and all pregnancy complications including ectopic pregnancies, trauma in pregnancy, pre-eclampsia/HELLP, sepsis, uterine abruption, placental abruption, diagnosis and treatment protocols. I have also

taught medical students, interns, and residents on the principles of immunology, and preventive measures for immunological diseases, as well as diagnosis and treatment.,

5. I have practiced Emergency Medicine in northern Idaho and in Boise, and performed consults on Emergency Department protocols in southern Idaho

6. I have been either an attending physician in multiple Emergency Departments, and/or the Medical Director, and/or supervising the Emergency Department physicians and medical director. I also managed EMS medical systems and set up protocols for obstetric patients in Idaho and California. The states where I have practiced Emergency Medicine include Idaho, California, Oregon, Washington, Hawaii, Alabama, Florida, North Carolina, Georgia, Montana, Louisiana, and Mississippi.

7. I have been a Regional Medical Director for three separate large national medical groups, and was involved in managing Emergency Departments, Hospitalists, and urgent care clinics in several states.

8. I have extensive prior experience in population management and disease management, and with the Emergency Medical Treatment and Labor Act ("EMTALA" 42 U.S.C. § 1395dd) as Chief Medical Officer of a large health plan in California, which included hospitals with tertiary Obstetric capabilities.

9. 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.

10. In fact, 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. Many of the cases presented assume that every hospital has the capability to take care of high-risk pregnancy cases. Unfortunately, this capability and availability of resources is only available in larger cities, just as only a very few hospitals can perform emergency heart surgery in a rural state such as Idaho. One of the life-saving aspects of EMTALA is that it helps those physicians in rural areas transfer care of certain patients to a hospital that has the capability to provide appropriate treatment. The scenarios presented in these declarations *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. Many tertiary care hospitals will refuse a transfer unless the patient is "adequately stabilized," and "adequately stabilized" is often at the discretion of the receiving hospital. Fortunately, to the best of my knowledge, refusal of transfer has not been a problem with the tertiary care hospitals in Idaho. In the case of a

high-risk pregnant woman, the most appropriate action to save the mother's life is to send to the closest hospital with the appropriate resources and personnel for the care of a critically ill pregnant woman .

11. In some of the most dire cases, it may not be possible to stabilize the pregnant patient prior to transfer to a tertiary care hospital. Then the Emergency Physician must call an obstetrician if available, and if none are available, he or she would be calling in a surgeon.

12. As former full-time and part-time teaching faculty member and Medical Director in multiple Emergency Departments, I have designed, implemented, and taught protocols for these same Emergency Departments that deal with all the life- threatening cases related to pregnancy. These protocols included diagnosis and treatment of ectopic pregnancies, septic shock, stroke, serious or life-threatening vaginal bleeding, traumatic injuries, cardiovascular emergencies, and other emergencies that threaten the life and health of the mother. In these emergency situations, the primary focus is on preserving the health, welfare, and life of the mother, and any procedure will be focused on treating the mother, not on the potential death of the child.

13. A real-world example that was not included in the declarations I have reviewed, but sadly I have also witnessed, and is the case of a pregnant woman with a gunshot wound to the chest or abdomen and her vital signs are deteriorating. The trauma surgeon would perform an emergency thoracotomy in order to stop the bleeding at the source. In such a case, the trauma surgeon's first thought is, "I must stop the source of the bleeding." It is *never*, "I must perform an abortion to save this woman's life." This is a matter of fact, even though the emergency thoracotomy commonly will include cross clamping of the aorta, which will most likely end the life of the unborn child. When the

surgeon dictates the operation note, abortion will not be listed as a procedure. Instead, if the mother survives and the child dies, there will be a post-mortem c-section of the baby.

14. In other words, the intent of the procedure is to save the life of the mother; it is an unintended consequence of the procedure that the baby dies. It appears thatDr. Fleisher is recommending that we redefine all maternal life-saving procedures as an "abortion," but this is a gross and misleading deception with dire consequences for the health of women.

15. 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.

16. I can find no literature, and the physician declarations do not cite any studies, where abortion is the first line treatment for any medical emergency. Although precipitous delivery is necessary in cases of pre-eclampsia and HEELP, the "life-saving" abortion that results in the death and dismemberment of a fetus in the uterus can cause an entire cascade of reactions that would in fact worsen many of the scenarios that are presented as life-saving.

17. 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.

18. I 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. Any competent surgeon would *first* find the source of the bleeding and take whatever steps were necessary to stop it, even if halting the bleeding of the mother resulted in the death of the developing baby.

19. In the case of a hypotensive patient due to a ruptured ectopic pregnancy, the patient will die without finding the bleeding source from the ruptured ectopic pregnancy, and ligating (suturing) and/or removing the bleeding blood vessels. The surgery required to stop the bleeding at the source may require removing the ruptured tube and/or bleeding ovary. Clearly, this procedure is not in the same class or category as an abortion, since an abortion does not include ligating bleeding arteries and removing the mother's fallopian tube (transports the egg) and/or ovary.

20. In fact, as long as the mother is conscious, an attempt at getting informed consent must be documented. Calling this life-saving procedure an abortion is not only disingenuous but would be a gross deception for the mother. The mother would think that an abortion had been performed, when in fact she had had a major, life-saving surgical procedure that also resulted in the death of the developing child. In explaining the procedure to a conscious mother, the obstetrician/surgeon would need to state this as a risk, and of course let her know that if the procedure were not performed then she would likely die.

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:

> 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.

22. Another example that Dr. Fleisher uses is where a pregnant individual presents with chest pain, shortness of breath, is pregnant, and has severe heart failure secondary to long-standing pulmonary hypertension. Clearly, this is a worst-case scenario for the mother and the emergency physician, even if the physician is at a high functioning tertiary care hospital with a high-risk obstetric team, interventional cardiology, a cardiovascular anesthesiologist, pulmonologist, intensivist, and other highly specialized equipment and capabilities. The mortality of such a patient is most likely greater than 50% no matter what you do, and the physician would want to choose carefully what is the most appropriate first action. I have been in situations like this, and the first thing any competent physician would do is to consult with each of the physicians to determine what is the best course of action *to save the life of the mother, and if possible, also save the life of the child*. Making terminating the pregnancy the primary objective could in fact be the worst first thing to do for the sake of the health of the mother. But it is also an unavoidable truth that if the mother does not survive, the child will also certainly not survive.

23. The vast majority of hospitals in Idaho would be unable to care for such a complicated pregnant patient without a high-risk obstetric team, a cardiologist, cardiac anesthesiologist, pulmonologist and other support staff. Thus, if 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, two provisions of EMTALA would appear to apply. First, the hospital's obligation to provide screening and stabilizing treatment to patients with an emergency medical condition is limited to such screening and treatment that

is "within the staff and facilities available at the hospital." (42 U.S.C. § 1395dd(b)(1)(a).) Thus, hospitals are able to transfer unstable patients without violating EMTALA where the hospital does not have the facilities or staff needed to stabilize the critically ill pregnant patient. Second, EMTALA prohibits the transfer of unstable patients, unless "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." (42 U.S.C. 1395dd(c)(1)(A)(ii).) Clearly, where the hospital does not have the facilities or staff to stabilize the patient, the benefits of transferring the patient outweigh the increased risks that would attend transfer.

24. In my opinion, Dr. Fleisher's conclusion that Idaho law prohibits treatment of pre-eclampsia, under the extreme and rare circumstances presented in his example, by providing treatment that is both necessary to stabilize the patient and also results in the loss of the developing child's life, is inaccurate. Pre-eclampsia, as described in Dr. Fleisher's example, would always be a life-threatening complication for the mother, and is particularly dangerous where it progresses into the often fatal HELLP syndrome.

25. Dr. Fleisher's fourth example is of a hypothetical patient who presents with a "life-threatening infection of the uterine contents." This hypothetical case in a "clinical vacuum" demonstrates the importance of having all the pertinent clinical information so as to come to a correct diagnosis before initiating appropriate treatment. For example, the treatment for sepsis is entirely different for uncontrolled vaginal bleeding, which is different than the treatment of an ectopic pregnancy.

26. While the example Dr. Fleisher gives describes someone who arrives with a "diagnosis,"in reality, an emergency physician will see a woman arriving at the ER with pain, fever, vaginal bleeding, abdominal pain, and/or myriad other complaints. The first order of business is always to have stat vital signs. A patient with normal vital signs (blood pressure, heart rate, oxygenation, and temperature) will require less emergent action, and allows for a more comprehensive diagnostic work up than a patient who has abnormal and dangerous vital signs.

27. Obviously, the treatment called for will depend upon the results of the patient's vitals and subsequent diagnostic work up. However, surgical intervention will only be necessary to stabilize the patient if other stabilizing treatments have failed – such as administering IV fluids, possible transfusion of blood if there is significant hemorrhage, providing blood pressure support, and giving antibiotics. Any surgical procedure deemed necessary at that point would not be considered an abortion, but rather life-saving surgery.

28. Dr. Fleisher's fifth example is of a (hypothetical) patient who presents with vaginal bleeding as a result of placental abruption – where the placenta partially or completely separates from the inner wall of the uterus. I agree with Dr. Fleisher's statement that "[p]lacental abruption with uncontrolled and catastrophic bleeding is an emergency medical condition that places the patient's life in jeopardy or can cause serious impairment to bodily functions." Thus, an immediate C-section is performed if the baby is at a certain gestational age, not an abortion (dismemberment of body parts). With placental abruption, time is of the essence, and the patient may quickly die without an immediate C-section.

29. Dr. Fleisher concludes that in each of these examples, termination of the pregnancy may be the type of treatment needed to stabilize the patient, which under the

EMTALA requires the hospital "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 the facility." 42 U.S.C. § 1395dd(e)(3)(A). It is my opinion that every one of the five examples provided by Dr. Fleisher present a life-threatening situation. Thus, if the conditions described in each of these examples have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that a life-saving surgery would more likely than not result in the termination of the pregnancy. However, the life-saving surgery is not an abortion, and the language in the Idaho statue permits such life-saving surgeries/procedures.

30. I have reviewed the declaration submitted by Dr. Emily Corrigan, including the examples she sets forth in her declaration of situations where termination of the pregnancy was necessary. It is my opinion that every one of the three examples provided by Dr. Corrigan present a life-threatening situation. Dr. Corrigan concludes that in each of these examples, termination of the pregnancy may be the type of treatment needed to stabilize the patient, which under EMTALA requires the hospital "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 the facility." 42 U.S.C. § 1395dd(e)(3)(A).

31. It is my opinion that every one of the examples provided by Dr. Corrigan present a life-threatening situation and are not prohibited under the Idaho Law.

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.

32. Dr. Corrigan's first example, Jane Doe 1, was diagnosed with preterm premature rupture of membranes ("PPROM"), or premature breaking open of the amniotic sac. I agree with Dr. Corrigan that PPROM "increases the risk of life-threatening intra-amniotic infection (chorioamnionitis) and also increases the risk that the fetus will not develop normally due to decrease in the amount of amniotic fluid." (Corrigan Declaration at 3.) I also agree with Dr. Corrigan that "[a]dministration of oral antibiotics and discharge home is not the medically accepted standard of care for suspected chorioamnionitis." (Corrigan Declaration at 4.) In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment was given.

33. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman. However again, the procedure performed would not be an abortion, but rather a dilation and evacuation(D&E). In short, in the scenario described by Dr. Corrigan, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman, but here again, the termination of the pregnancy is not the intent of the surgery. The intent of the surgery is to remove infected tissues that will lead to overwhelming sepsis and death of the mother. Further, I see nothing

in the Idaho law that would preclude this life-saving procedure. Labelling as an abortion the heroic life-saving surgery that involved removal of infected fetal tissue which would certainly lead to the death of the baby an abortion is a gross deception of the obstetrician's superior skill and judgement.

34. Dr. Corrigan's example of Jane Doe 1 demonstrates how EMTALA was designed to work without any conflict between it and Idaho law, and where the transferring physician and hospital are unable to properly care for the patient, the patient was promptly and appropriately transferred to the tertiary care hospital for definitive care.

35. Jane Doe 2 presented to an outlying hospital emergency department experiencing significant bleeding resulting from a placental abruption (separation of the placenta from the wall of the uterus before birth), which progressed to disseminated intravascular coagulation ("DIC"). I agree with Dr. Corrigan that DIC "is a dangerous condition that creates a high risk of death for the mother due to the rapid loss of large volumes of blood." By the time Jane Doe came to Dr. Corrigan for treatment "[t]he risk of her death at that point was imminent and the fetus still had a detectible heart rate." The pregnancy was terminated by a dilation and evacuation ("D&E") procedure.

36. Labelling as an abortion the life-saving surgery that saves the mother's life by removing the ruptured placenta is again a gross deception of the obstetrician's superior skill and judgement. Further, the baby can't survive a ruptured placenta, despite the still detectable heartbeat, so the baby was doomed to die due to the ruptured placenta. Thus, it is an abhorrent distortion to claim that this life-saving procedure was an abortion. Clearly again, the Idaho statute does not preclude saving the mother's life, and the baby was tragically going to die with or without surgery, just as in the case of an ectopic pregnancy.

37. In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment was given. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman. In short, in the scenario described by Dr. Corrigan, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman. It must be stated yet one more time that the intent of the surgery was to save the mother's life, and the baby was not going to survive an abruption of the placenta, the source of blood and oxygen.

38. Jane Doe 3 was diagnosed with pleural effusions, sometimes called "water on the lungs," that were being caused by a case of pre-eclampsia with severe features. I agree with Dr. Corrigan that "[w]hen [preeclampsia] occurs before 20-week's gestation, as it did for Jane Doe 3, it is typically severe and carries a high risk of maternal and fetal death." The pregnancy was terminated by a D&E procedure. In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment was given. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman. In short, in the scenario described by Dr. Corrigan,

I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman.

39. Here again, the intent of the surgery was to save the mother's life, as the baby would not survive if the mother is dead. Idaho law as written is not in conflict with the life-saving procedure performed on the mother.

40. I have reviewed the declaration submitted by Dr. Kylie Cooper, including the examples she sets forth in her declaration of situations where termination of the pregnancy was necessary. It is my opinion that every one of the three examples provided by Dr. Cooper present a life-threatening situation that would require termination of the pregnancy in order to preserve the life of the mother. Dr. Cooper concludes that in each of these examples, termination of the pregnancy may be the type of treatment needed to stabilize the patient, which under EMTALA requires the hospital "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 the facility." 42 U.S.C. § 1395dd(e)(3)(A). It is my opinion that every one of the examples provided by Dr. Cooper present a life-threatening situation. Thus, if the conditions described in each of these examples have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy would be necessary to save the life of the pregnant woman.

41. In short, in the scenarios described by Dr. Kylie Cooper, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the

death of the pregnant woman, and I see nothing in the Idaho law that would conflict with that judgment. 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.

42. Dr. Cooper's first example is Jane Doe 1, who presented to the emergency department with severe range blood pressures and whose fetus had already been diagnosed with triploidy, a chromosomal abnormality that leads to multiple severe birth defects that are "not compatible with life." (Cooper Declaration at 3.) Jane Doe was also diagnosed with preeclampsia. I agree with Dr. Cooper that "'[g]iven her severe illness placing her at risk for stroke, seizure, pulmonary edema, development of HELLP syndrome (hemolysis, elevated liver enzymes, and low platelets), urgent termination of pregnancy was the recommended treatment to stop her disease progression to preserve her health and life." In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment were given. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman.

43. In short, in the scenario described by Dr. Cooper, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman. The intent of the surgery is to save the mother's life, and if the mother dies the baby dies.

44. Dr. Cooper's second example, Jane Doe 2, had a pregnancy complicated by a cluster of adverse life threatening fetal and maternal conditions, including severe intrauterine growth restriction, abnormal amniotic fluid level, abnormal umbilical cord blood flow, elevated blood pressures and lab abnormalities consistent with a diagnosis of HELLP syndrome. Furthermore, Jane Doe 2's labs quickly deteriorated such that she required a platelet transfusion, had evidence of hemolysis, and was at risk for DIC ("a life-threatening emergency related to the body's inappropriate consumption of blood-clotting factors leading to systemic bleeding, liver hemorrhage and failure, kidney failure, stroke, seizure, pulmonary [and] edema."). (Cooper Declaration at 3-4.) In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment were given. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman.

45. In short, in the scenario described by Dr. Cooper, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman. The intent of the surgery/procedure was to save the life of the mother, not to perform an abortion. In addition, given the nature of the baby's unfortunate abnormalities, the baby would not likely have survived with or without the procedure, particularly in addition to the unfortunate adverse effects of the pregnancy on the mother, further compromising the survivability of the baby. I do not see where Idaho law also would be in conflict with the heroic efforts of the obstetrician

46. Jane Doe 3 presented to the emergency room with acute onset severe abdominal pain, was noted to be hypertensive and her lab abnormalities were consistent with a diagnosis of HELLP syndrome. Also, placental ultrasound was consistent with fetal triploidy, "a lethal fetal condition." Jane Doe 3's abdominal pain and rapidly rising liver enzymes were indicative of liver injury and her platelets were declining rapidly. I agree with Dr. Cooper's assessment that "[i]n the setting of pre-viable HELLP syndrome she was at risk for DIC, liver hemorrhage and failure, kidney failure, stroke, seizure, [and] pulmonary edema." (Cooper Declaration at 4.) In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment were given. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman.

47. In short, in the scenario described by Dr. Cooper, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman. As noted by Dr. Cooper, the baby had a fatal condition, and the intent of the surgery was to prevent the death of the mother. As has been previously discussed, HELLP syndrome is a highly lethal condition, and requires the expert care that was given by Dr. Cooper in an appropriate tertiary care facility. Idaho law as written does not conflict with the life-saving surgery performed.

48. I have reviewed the declaration submitted by Dr. Stacy T. Seyb, including the examples he sets forth in his declaration of situations where termination of the pregnancy

was necessary. It is my opinion that every one of the three examples provided by Dr. Seyb present a life-threatening situation. Dr. Seyb concludes that in each of these examples, termination of the pregnancy may be the type of treatment needed to stabilize the patient, which under EMTALA requires the hospital "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 the facility." 42 U.S.C. § 1395dd(e)(3)(A). It is my opinion that every one of the three examples provided by Dr. Seyb present a life-threatening situation. Thus, if the conditions described in each of these examples have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy would be necessary to save the life of the pregnant woman.

49. In short, in the scenarios described by Dr. Stacy T. Seyb, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman, and I see nothing in the Idaho law that would prohibit such treatment from being given. 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.

50. Dr. Seyb's first example, Jane Doe 1, presented to the emergency department with fever, tender uterus, elevated heart rate and evidence of an intrauterine infection. The suspicion that her bag or water had ruptured 10 days earlier was confirmed by ultrasound that showed no fluid around the baby and confirmed that she had a condition termed Septic

Abortion. I agree with Dr. Seyb's assessment that "[h]ad Jane Doe 1 not received both antibiotics and termination of the fetus to allow removal of the infected tissue, the chance of her progressing to severe sepsis and dying was very high." (Seyb Declaration at 3.) In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment were given. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman.

51. In the scenario described by Dr. Seyb, I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman. The baby was already dead from the septic abortion(miscarriage), and the infected fetal tissues would casue the death of the mother if not removed. Here again, to describe this as an abortion procedure is a gross mischaracterization of the heroic life-saving surgery performed by Dr. Sayb, and does not conflict with Idaho law as written.

52. In Jane Doe 2, Dr. Seyb describes a 35-year old woman with severe range blood pressure and laboratory values that were consistent with pre-eclampsia with severe features. Also, ultrasound revealed a partial molar pregnancy.

53. The following is UpToDate description of a molar pregnancy:

> A molar pregnancy is not even a viable pregnancy, so the procedure performed would have been a D&E, not an abortion. Hydatidiform mole (HM) was first described by Hippocrates around 400 BCE as "dropsy of the uterus." Since that time, HM (also referred to as molar pregnancy or mole) has been of clinical and research interest. Molar pregnancy is part of a group of diseases classified as gestational trophoblastic disease (GTD), which originate in the placenta and have the potential to locally invade the uterus and metastasize. The pathogenesis of GTD

> is unique because the maternal tumor arises from gestational rather than maternal tissue [1].

54. Thus, even though there was a baby, there was also a partial molar pregnancy that would likely compromise the viability of the baby. In addition, the partial molar pregnancy was causing severe pre-eclampsia, threatening the life of the mother and the baby. Thus, clearly the intent of the surgery was to save the life of the mother, and the baby's probability of survival even without all the complications was probably close to zero. Yet again, to describe this as an abortion procedure is a gross mischaracterization of the heroic life-saving surgery performed by Dr. Sayb, and does not conflict with Idaho law as written

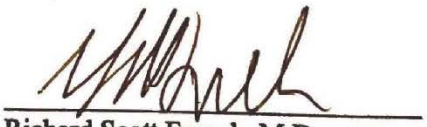
55. Dr. Seyb's third example, Jane Doe 3, presented to the emergency department "after she started bleeding very heavily per vagina." (Seyb Declaration at 4.) Jane Doe 3 was experiencing hypovolemic shock due to her blood loss, and although "[i]nitial resuscitation improved her condition, she continued to bleed in an uncontrolled manner." (Id.) I agree with Dr. Seyb's assessment that "[i]f left untreated the risks of life-threatening shock, even with blood replacement were very high." In my opinion, a pregnant patient who presents with the specific conditions described in this example, and whose condition is such that it is not safe to transfer the patient until stabilizing treatment is given, would be in a life-threatening situation if no treatment were given. Thus, if the conditions in this example have reached the point that it is not safe to transfer the patient until stabilizing treatment is given, it would be my good faith medical opinion that termination of the pregnancy was necessary to save the life of the pregnant woman.

56. In the scenario described by Dr. Seyb, the pregnant woman was very close to death from hypovolemic shock due to blood loss from a 19 week gestation pregnancy. Dr.

Seyb's heroic management included the initial resuscitation with fluid and blood, but unfortunately the resuscitation could not keep up with the bleeding. As is the case of life-threatening bleeding, the bleeding must be stopped at the source. Unfortunately, in this case, the source was the pregnancy. I could in good faith make the medical judgment that terminating the pregnancy was necessary to prevent the death of the pregnant woman. Yet again, the life of the mother was at stake, and Idaho law as written is not in conflict with the life saving procedure.

57. I submit this declaration in support of the Idaho Legislature's Opposition to the Government's Motion for Preliminary Injunction. Unless otherwise stated, the facts set forth herein are true of my own personal knowledge, and if called to testify as a witness in this matter, I could and would testify competently thereto.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Richard Scott French, M.D.

HARDER DECLARATION EXHIBIT B

Idaho Abortion Reporting (RESPONSE)

In April 2000, the question "If patient is under 18 years of age, complete either 19a or 19b" was added to the Idaho Report of Induced Termination of Pregnancy. However, data on Informed consent was required to be collected by legislation beginning March 27, 2007.

Question 19b is specifically "Termination performed following medical emergency". From March 27, 2007 through December 31, 2021, there has been one induced termination reported in which the patient was under 18 years of age and the termination performed was for medical emergency. The report was in 2013. There have been none reported in 2022; however, 2022 data are preliminary and are based on records filed as of 7/21/2022. From March 27, 2007 through records filed-to-date in 2022, there have been 886 abortions to teens under the age of 18 in Idaho.

On January 1, 2013, the question "If determination of Postfertilization age was 20 weeks or greater, or unknown complete Item 20" was added to the Idaho Report of Induced Termination of Pregnancy. From January 1, 2013 through December 31, 2021 there have been 5 induced terminations in Idaho at 20 weeks or greater postfertilization. The five terminations occurred in 2013 (1 report), 2016 (1 report), 2019 (1 report), and 2021 (2 reports). The medical condition that necessitated the abortion at 20 or greater weeks postfertilization was:

1) Patient had a condition that so compilated her medical condition as to necessitate the abortion of this pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions (1 report in 2016).
2) It was necessary to preserve the life of unborn child (1 report 2013)

Box was not checked, but medical condition was written in (1 report in 2021)
Question 20 was left blank (1 report in 2019 and 1 report in 2021).

There have been none reported to date in 2022; however, 2022 data are preliminary and are based on records filed as of 7/21/2022.
From January 1, 2013 through records filed to-date in 2022, there have been 13,392 abortions in Idaho to patients of all ages.

Note: 20 weeks or greater postfertilization is equal to 22 weeks or greater clinical estimation of gestation.

There is no other report that I know of that involves abortions performed for emergency reasons.

Pam Harder
Research Analyst Supervisor
Health Statistics Section
Bureau of Vital Records and Health Statistics
Division of Public Health

HARDER DECLARATION EXHIBIT A

TYPE/PRINT IN PERMANENT BLACK INK

FOR INSTRUCTIONS SEE HANDBOOK

State of Idaho

REPORT OF INDUCED TERMINATION OF PREGNANCY

State File No. _____

1. FACILITY NAME (if not clinic or hospital, give address)	2. CITY, TOWN, OR LOCATION OF PREGNANCY TERMINATION	3. COUNTY OF PREGNANCY TERMINATION

4. PATIENT'S IDENTIFICATION CODE	5. AGE LAST BIRTHDAY (if under 18, you must complete item #19)	6. MARRIED? (At termination, conception, or any time between) ☐ YES ☐ NO	7. DATE OF PREGNANCY TERMINATION (Mo, Day, Yr)

8a. RESIDENCE - STATE	8b. COUNTY	8c. CITY, TOWN, OR LOCATION	8d. INSIDE CITY LIMITS? ☐ YES ☐ NO	8e. ZIP CODE (First five digits only)

9. OF HISPANIC ORIGIN? (Specify No or Yes- if yes, specify Cuban, Mexican, Puerto Rican, etc.) ☐ NO ☐ YES Specify: _____	10. RACE - American Indian, Black, White, Japanese, etc. (Specify below)	11. EDUCATION (Specify only highest grade completed)	
		Elementary/Secondary (0-12)	College (1-4 or 5+)

12. DATE LAST NORMAL MENSES BEGAN (Month, Day, Year)	14. PREVIOUS PREGNANCIES (Complete each section)			
	LIVE BIRTHS		OTHER TERMINATIONS	
13a. CLINICAL ESTIMATE OF GESTATION (Weeks) (See question #20 for additional information)	14a. Now Living	14b. Now Dead	14c. Spontaneous (Include fetal deaths)	14d. Induced (Do not include this termination)
13b. METHOD OF DETERMINING GESTATIONAL AGE ☐ Ultrasound ☐ Other (specify) _____ ☐ Pelvic Exam ☐ None	Number _____ ☐ None	Number _____ ☐ None	Number _____ ☐ None	Number _____ ☐ None

15. TERMINATION PROCEDURES

15a. PROCEDURE THAT TERMINATED PREGNANCY (Check only one)

		15b. ADDITIONAL PROCEDURES USED FOR THIS TERMINATION, IF ANY (Check all that apply)
(1) ☐	Suction Curettage	(1) ☐
(2) ☐	Medical (Nonsurgical) (Specify medications below) _____	(2) ☐
(3) ☐	Dilation and Evacuation (D&E)	(3) ☐
(4) ☐	Intra-Uterine Instillation (Saline or Prostaglandin)	(4) ☐
(5) ☐	Sharp Curettage (D&C)	(5) ☐
(6) ☐	Hysterotomy/Hysterectomy	(6) ☐
(7) ☐	Other (Specify) _____	(7) ☐

15c. WAS THERE A COMPLICATION WITH THIS ABORTION, AS DEFINED BY IDAHO CODE §39-9503(02)

☐ No
☐ Yes

If Yes, you must complete and submit the Abortion Complications Reporting Form to the Bureau of Vital Records and Health Statistics within 90 days.

16. PATIENT EDUCATIONAL MATERIALS PROVIDED? ☐ YES ☐ NO	17. NAME OF ATTENDING PHYSICIAN (Type/Print)	18. NAME OF PERSON COMPLETING REPORT (Type/Print)

IF PATIENT IS UNDER 18 YEARS OF AGE, COMPLETE EITHER 19a. OR 19b.

19a. TERMINATION PERFORMED FOLLOWING PHYSICIAN'S RECEIPT OF: (Check only one)

(1) ☐ Written informed consent of a parent, guardian or conservator and the minor
(2) ☐ Written informed consent of emancipated minor for herself
(3) ☐ Written informed consent of minor for herself pursuant to court order granting minor right to self-consent
(4) ☐ Court order which includes finding that abortion is in best interests of minor, despite absence of parental consent
(5) ☐ Certification from minor that pregnancy resulted from rape or sexual conduct with minor by the minor's parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian, or foster parent

OR

19b. TERMINATION PERFORMED FOLLOWING MEDICAL EMERGENCY: (*Specify diagnosis below*)

_____

IF DETERMINATION OF POSTFERTILIZATION AGE WAS 20 WEEKS OR GREATER, OR UNKNOWN, COMPLETE ITEM 20

20. MEDICAL CONDITION THAT NECESSITATED THE ABORTION AT 20 OR GREATER WEEKS POSTFERTILIZATION:

(1) ☐ Patient had a condition that so complicated her medical condition as to necessitate the abortion of this pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions

(2) ☐ It was necessary to preserve the life of an unborn child

(3) ☐ Determination of probable postfertilization age was not made. Provide the basis of the determination that a medical emergency existed: (*specify below*)

_____

Submit directly to:
Vital Statistics
P.O. Box 83720
Boise, Idaho 83720-0036

HWH-0135
(6-19)

DRAFT

EXHIBIT 2

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 **DECLARATION OF PAM HARDER**

DECLARATION OF PAM HARDER

I, Pam Harder, being first duly sworn under oath, state and depose upon personal knowledge as follows:

1. I am a Research Analyst Supervisor with the Idaho Department of Health and Welfare Bureau of Vital Statistics ("DHW").

2. I am authorized to compile data reported to the DHW.

3. There are certain statutory reporting requirement associated with performing an abortion in Idaho. These reports are made by physicians to the DHW through the State of Idaho Report of Induced Termination of Pregnancy ("Form"). *See attached Exhibit A.*

4. Pursuant to Idaho Code § 18-506 any physician who performs or induces or attempts to perform or induce an abortion must report such action to the Idaho Department of Health and Welfare. Included in the required information is the following:

   a. "If a determination of probable postfertilization age was not made, the basis of the determination that a medical emergency existed" (I.C. § 18-506(b)); and

b. "If the probable postfertilization age was determined to be twenty (20) or more weeks, the basis of the determination that the pregnant woman had a condition that so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function . . . ." (I.C. § 18-506(c)).

5. This information, if applicable, is reported by the attending physician in question 20 of the Form.

6. Furthermore, Idaho Code § 18-609G(1)(b) mandates the reporting of whether an abortion was performed following a medical emergency that made the abortion immediately necessary and without consent from a parent, guardian, or conservator in circumstances where the patient is under 18 years of age—with the specific diagnosis included.

7. This information, if applicable, is reported by the attending physician in question 19b of the Form.

8. I certify that I have compiled all of the data reported to the Idaho Department of Health and Welfare on questions 19b and 20 of the Idaho Report of Induced Termination of Pregnancy per year for the years 2007 to 2021 for question 19b and years 2013 to 2021 for question 20. Those are all the years that the answers to these questions have been required by the Idaho legislature to be collected by the DHW. I further certify that the compilation is true and accurate. *See attached Exhibit B.*

I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is to the best of my knowledge true and correct. Executed this 16th day of August 2022, in Boise, Idaho.

August 16, 2022

Date

Pamela Harder

Digitally signed by Pamela Harder
DN: cn=Pamela Harder, c=US, o=Idaho Dept of Health and Welfare, ou=BVRHS, email=Pam.Harder@dhw.idaho.gov
Date: 2022.08.16 16:12:02 -06'00'

Pam Harder

EXHIBIT 1

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 **DECLARATION OF TAMMY REYNOLDS, M.D.**

DECLARATION OF TAMMY REYNOLDS, M.D.

I, Dr. Tammy Reynolds, being first duly sworn under oath, state and depose upon personal knowledge as follows:

1. I am a board-certified Obstetrician-Gynecologist ("Ob-Gyn"). In my practice I regularly participate in and manage high risk pregnancies. I submit this declaration in support of the Idaho Legislature's Opposition to the United State's Motion for Preliminary Injunction. Unless otherwise stated, the facts set forth herein are true of my own personal knowledge, and if called as a witness to testify in this matter, 1 could and would testify competently thereto. In this respect, I note that I am not able to testify on August 22, 2022, but can testify remotely on August 23, 2022.

2. I was raised in Idaho Falls, Idaho, graduating from Idaho Falls High School; received my bachelors degree from the University of Utah and my medical degree from George Washington University in 2007; completed my residency in Obstetrics and Gynecology at the University of Nevada School of Medicine in 2011; and since then have

been in private practice with the largest Ob-Gyn group in Nevada, with more than 30 Ob-Gyn colleagues. Since the beginning of my residency in 2007 and continuously since, I have been involved with hundreds of emergency-room treatments of patients needing Ob-Gyn care. I have handled thousands of live births, and over the course of my career, I have treated thousands of pregnant women.

3. In my experience, the situations necessitating emergency procedures to save the life of the mother, that also might be deemed an abortion in the medical community, are rare. In my 11 years in private practice, I have only encountered one such event. In my opinion, any such event would be lawful under Idaho Code § 18-622 ("622 Statute") because the abortion would be "necessary to prevent the death of the pregnant woman." I have read and am familiar with the 622 Statute.

4. I understand that in this civil action the Government is claiming that there is a certain class of emergency medical conditions (i) where medically appropriate treatment of the mother will result in the death of the preborn child, (ii) where the federal Emergency Treatment and Labor Act, 42 U.S.C. § 1395dd ("EMTALA") requires that treatment, but (iii) where the 622 Statute prohibits it because it is not necessary to save the life of the mother. I am not aware of any term in the medical profession for this highly conceptual class of emergency medical conditions. Hereafter, I will refer to this conceptual class and the medical procedures allegedly falling within it collectively as "Relevant Abortions" to be consistent with the prior filings of the Legislature's lawyers and to avoid confusion.

5. I have read and am familiar with EMTALA's language defining an emergency medical condition: "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."

6. In my experience, I've never encountered nor have I ever been made aware of a Relevant Abortion. Relevant Abortions, if they even exist as a real-world medical event, would be exceedingly rare. Again, I have never encountered a situation where an emergency abortion was performed because otherwise the mother's bodily functions, organs, or parts risked serious impairment but her life was not at risk.

7. Further, 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. To the contrary, based on the plain language of those descriptions, each case involved an emergency medical procedure to save the life of the mother. Meaning, 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.

8. I read ¶ 12 of Dr. Corrigan's declaration as an effort to portray the 622 Statute as the cause of increased risk for the patient. I disagree with that conclusion. In my opinion, the increased risk to Jane Doe #1 in Dr. Corrigan's declaration resulted from two closely related acts of medical malpractice by the treating physician referenced there: one, not correctly identifying that the PPROM diagnosis meant that there was a serious risk to

the life of the mother and, two, misunderstanding the scope of the Idaho abortion statutes. In my judgment, 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.

9. In my opinion, the 622 Statute's language about abortions necessary to prevent the death of the mother provides a clear and workable standard for Idaho medical professionals to effectively, and quickly, provide emergency medical procedures necessary to save the life of the mother without fear of prosecution. Those Idaho medical professionals will be able to do so without violating EMTALA in any real way because, as I discuss above, although Relevant Abortions may be theoretically possible, nothing in the declarations of the Idaho doctors, coupled with nothing from my own experience, suggests the existence of Relevant Abortions in Idaho.

10. Accordingly, it is my opinion that attending Idaho physicians can determine, in their good faith medical judgment, whether the mother's condition is such that an emergency medical procedure is necessary to avoid the mother's death and when it is not. It is also, therefore, my opinion that these physicians may proceed without the kinds of subjective "fears" and "chillings" suggested in the declarations of the three Idaho doctors.

11. Regarding Dr. Fleisher's declaration, I have just had the opportunity to read the declaration of Richard Scott French, M.D. In my opinion, his testimony is medically sound and valid.

12. Termination of an ectopic pregnancy is not an abortion and 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.

13. The following conditions may constitute a medical emergency under the Idaho statutes that necessitate an emergency abortion to save the life of the mother:

a. A case of severe pre-eclampsia in the mother prior to 20 weeks of gestation or eclampsia;

b. A severe case of PPROM (preterm premature rupture of membranes) leading to infection and serious risk of sepsis;

c. A severe case of catastrophic, uncontrolled, and/or severe vaginal bleeding caused by placental abruption; and/or

d. A long-standing pulmonary hypertension or a massive pulmonary embolism, exacerbated by complications during pregnancy.

14. Neither I nor, in my opinion, any practicing Ob-Gyn would reasonably fear criminal prosecution under the 622 Statute in any of the above-listed circumstances because they necessitate early delivery (if possible) or an emergency medical procedure necessary to preserve the life of the mother. In circumstances where the mother's life is in danger, a reasonable and competent medical professional would not delay life-saving care due to the fear of legal repercussions under the 622 Statute because the circumstances where emergency medical procedures are necessary to save the life of the mother are obvious.

15. The doctor-declarants' comments about "fears" and "chillings" of doctors already in Idaho and of Ob-Gyn doctors considering relocating to Idaho do not ring true to me, for all the reasons I have given above. They also mention a concern about a shortage of Ob-Gyns. The general shortage of Ob-Gyns is appreciated throughout the country, especially in rural areas.

16. Regarding the declaration that Idaho is a "hotbed" for surrogacy, once a pregnant woman presents and is correctly diagnosed as being in a medical emergency that threatens the life of the mother, how the pregnancy started does not alter the work, responsibility, or judgment thereafter of the treating medical professionals

17. I have not been paid consideration in any form for my work in making this declaration and will not be paid for my future testimony for a hearing on the preliminary injunction, whether in-person or remotely, in this civil action, other than reimbursement of actual expenses such as for travel. I am making this declaration out of my personal commitment to the best practices of my profession, including their interaction with duly enacted abortion laws.

I declare under penalty of perjury under the laws of the State of Idaho and of the United States that the foregoing is to the best of my knowledge true and correct.

Date: Monday, August 15, 2022

Tammy Reynolds, M.D.

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

DECLARATIONS IN SUPPORT OF IDAHO LEGISLATURE'S OPPOSITION TO THE GOVERNMENT'S MOTION FOR PRELIMINARY INJUNCTION

The following declarations are filed in support of Idaho Legislature's Opposition to the Government's Motion for Preliminary Injunction, Dkt. 65:

1. Declaration of Tammy Reynolds, M.D. (Exhibit 1);

2. Declaration of Pam Harder (with Exhibits A and B) (Exhibit 2);

3. Declaration of Richard Scott French, M.D. (Exhibit 3); and

4. Declaration of Prosecuting Attorney Grant Loebs (Exhibit 4).

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

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

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

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

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

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

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

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

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

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

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

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

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

M B & H
MORRIS BOWER & HAWS PLLC

12550 W. Explorer Drive, Suite 100, Boise, Idaho 83713
1305 12th Ave. Rd., Nampa, Idaho 83686
Tel: (208) 345-3333 | Fax: (208) 345-4461

Daniel W. Bower
dbower@morrisbowerhaws.com

August 15, 2022

Sent via ECF

The Honorable B. Lynn Winmill
United States District Court Judge

Re: *United States v. State of Idaho*; Case No. 1:22-cv-329
Letter Brief of Intervenor-Defendant Idaho Legislature

Dear Judge Winmill:

Intervenor-Defendants ("Legislature") hereby submit the requested letter brief on this important issue: In the context of a motion for preliminary injunction, where the parties by competent but opposing declarations have created a genuine issue of fact material to the resolution of the motion, may the district court resolve the motion without resort to live testimony?

The declarations now being prepared—and to be timely filed—in opposition to the declarations of Doctors Cooper, Corrigan, Seyb, and Fleisher give rise to exactly that issue.

The Second, Third, Seventh, and Eleventh Circuits have answered that issue with a "no." Those circuits do so on the grounds that (i) the materiality of the disputed issue of fact requires that it must be resolved in order to correctly rule on the motion for preliminary injunction, (ii) the disputed material issue of fact cannot be resolved sensibly without credibility determinations, and (iii) a district court cannot properly make the necessary credibility determinations on the basis of only cold declarations. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1312-13 (11th Cir. 1998); *Swiderek v. Cont'l Micro, Inc.*, 680 F.2d 37, 38 (7th Cir. 1981) ("If witnesses are not heard the trial court will be left in the position of preferring one piece of paper to another.") (citing *Sims v. Green*, 161 F.2d 87, 88 (3d Cir. 1947)). Thus, live testimony is required.

The Ninth Circuit, however, appears to have rejected this approach. *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 555 (9th Cir. 1986). In doing so, however, the Ninth Circuit has never said that a district court may not receive live testimony in these circumstances, and some district courts in the circuit have elected to do just that.

Mecinas v. Hobbs, 30 F.4th 890, 895 (9th Cir. 2022); *Aguierre v. Chula Vista Sanitary Serv. & Sani-Tainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976).

What the Ninth Circuit has also not done, according to our necessarily rapid research, is provide any guidance on how the district court, in the absence of live testimony, is to treat and "solve" the opposing factual accounts in resolving the motion for preliminary injunction. That lack of guidance is problematic because, after all, the dispute is over facts *material* to resolution of the motion.

In the absence of such guidance, we urge resort to fundamental principles. First, the 622 Statute comes before this Court with a presumption of constitutionality. *E.g., Burlington N. R. Co. v. Dep't of Pub. Serv. Regul.*, 763 F.2d 1106, 1114 (9th Cir. 1985). Second, it is Plaintiff's burden to establish each element of its entitlement to a preliminary injunction, including the likelihood-of-success-on-the-merits element. E.g., *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016). Third, Plaintiff cannot meet its burden if one or more of those elements requires a showing by admissible evidence of a material fact and Plaintiff fails to show that that material fact is itself likely to be accepted in the end. E.g., *Patterson v. Daniels*, No. CIV.A. 12-1674, 2013 WL 2100546, at *21 (E.D. La. Mar. 22, 2013), report and recommendation adopted, No. CIV.A. 12-1674, 2013 WL 2100527 (E.D. La. May 14, 2013) ("Plaintiff's allegations must be accepted as true for the initial screening process required for his original complaint. . . . No such requirement . . . applies to plaintiff's request for injunctive relief. Under these circumstances, I cannot conclude that plaintiff has a substantial likelihood of success on the merits for purposes of the entry of preliminary injunctive relief."); *Aliah K. ex rel. Loretta M. v. Hawaii, Dep't of Educ.,* 788 F. Supp. 2d 1176, 1196 (D. Haw. 2011); *see also Stanley v. Univ. of Southern California*, 13 F.3d 1313 (9th Cir.1994) (relief must be denied unless the *facts* and law clearly favor the moving party).

These fundamental principles, when applied in the present circumstances of this case, mean that the Government cannot meet its burden and therefore no preliminary injunction can issue—unless and until there is live testimony adequate for the making of credibility determinations. Thus, the Government's opposition to live testimony is tantamount to a withdrawal of its motion.

Respectfully submitted,

MORRIS BOWER & HAWS PLLC

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

/s/ Monte Neil Stewart
Monte Neil Stewart

Attorneys for Intervenor-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 **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

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
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) 514-5578
lisa.n.newman@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 **MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Federal law requires certain hospitals receiving federal Medicare funds to offer treatment to individuals experiencing medical emergencies. Under the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, individual patients must be provided "stabilizing care" when they seek treatment at a covered hospital for an "emergency medical condition." An emergency medical condition exists when a patient's "health" is in "serious jeopardy" or the patient risks "serious impairment to bodily functions" or "serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395dd(e)(1)(A). Some patients who experience these medical emergencies are pregnant, and in some situations the necessary stabilizing treatment for such a pregnant patient involves termination of the pregnancy. In those circumstances, EMTALA requires that hospitals offer that stabilizing treatment to the patient, who can then decide whether to proceed.

In direct conflict with this federal requirement, the State of Idaho has enacted a near-absolute ban on abortion that is scheduled to go into effect on August 25, 2022. *See* Idaho Code § 18-622 (2020). Under Idaho's law, any physician who terminates a pregnancy can be indicted, arrested, and prosecuted on felony charges, regardless of the medical need for the procedure. A physician may avoid criminal liability only by proving a narrow "affirmative defense"—as relevant here, that the abortion was "necessary to prevent the death of the pregnant woman." *Id.* § 18-622(3)(a)(ii). That defense is far narrower than the circumstances in which EMTALA requires providing stabilizing treatment. Where EMTALA's standard is met but the treatment is not strictly "necessary to prevent the death" of the patient, it is impossible for a physician to comply both with the obligations of EMTALA and § 18-622. And even in cases where termination of the pregnancy is necessary to prevent the patient's death, the Idaho law requires a physician to risk arrest and prosecution for each abortion performed because the law affords only an "affirmative defense" that the physician must prove at trial. By threatening physicians with criminal prosecution—even when they provide treatment in emergency, life-

threatening situations as federal law requires—Idaho's law penalizes and discourages such treatment, and thereby conflicts directly with federal law. In these respects, federal law preempts § 18-622.

If allowed to go into effect, the Idaho law will cause significant irreparable harm, including to the public health of patients across Idaho. As the declaration of Dr. Lee A. Fleisher (attached as Ex. A) demonstrates, there are emergency conditions affecting pregnant individuals for which the medically necessary treatment involves termination of the pregnancy. But § 18-622 criminalizes providing such treatment, despite the extremely serious risk that, for example, a patient with an ectopic pregnancy might bleed to death, an infection could turn into sepsis and cause organ failure, or seizures caused by eclampsia might prove uncontrollable. Physicians practicing within Idaho likewise confirm that, if § 18-622 takes effect, pregnant patients experiencing emergency conditions will suffer. *See* Decls. of Dr. Emily Corrigan, Dr. Kylie Cooper, and Dr. Stacy T. Seyb (attached hereto as Exs. B-D). These facts establish clear irreparable harm and a strong public interest in enjoining § 18-622 from going into effect as applied to EMTALA-mandated care. The Court should grant the United States' motion for a preliminary injunction.

BACKGROUND

I. Federal Law

A. Supremacy of Federal Law

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. Pursuant to that principle, "states 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).

When "Congress enacts a law that imposes restrictions or confers rights on private actors," and "a state law confers rights or imposes restrictions that conflict with the federal law," the "federal law takes precedence and the state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018). If a "statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Puerto Rico v. Franklin Calif. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (citation omitted).

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

Medicare is a federally funded program, administered by the Secretary of Health and Human Services (HHS), that generally pays health care providers for health care services under certain circumstances. *See* 42 U.S.C. § 1395 *et seq.* Participation in Medicare is voluntary, and each provider must submit an agreement to the Secretary promising to comply with certain conditions in return for receipt of Medicare funding. *See id.* § 1395cc. Although Medicare generally does not contemplate Federal employees "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, that does not prevent the Federal Government from establishing and enforcing conditions of participation in Medicare, *see Biden v. Missouri*, 142 S. Ct. 647, 654 (2022), nor does it eliminate Congress's "broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds." *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568 (2022).

Congress enacted EMTALA in 1986, based on "a growing concern about the provision of adequate emergency room medical services to individuals who seek care, particularly as to the indigent and uninsured." H.R. Rep. No. 99-241, Part 3, at 5 (1985); *see also Arrington v. Wong*, 237 F.3d 1066, 1073-74 (9th Cir. 2001) ("The overarching purpose of EMTALA is to ensure that patients, particularly the indigent and underinsured, receive adequate emergency medical care." (alterations and citations

omitted)). EMTALA applies to every hospital that has an emergency department and participates in Medicare, *see* 42 U.S.C. § 1395dd(e)(2), regardless of whether any particular patient qualifies for Medicare. Congress has statutorily required that hospitals participating in Medicare agree to comply with EMTALA as a condition of receiving federal funding. *See id.* § 1395cc(a)(1)(I)(i).

Under EMTALA, when a patient arrives at an emergency department and requests treatment, the hospital must provide an appropriate medical screening examination "to determine whether or not an emergency medical condition" exists. *Id.* § 1395dd(a); *see also* 42 C.F.R. § 489.24(a)(1)(i). Congress defined an "emergency medical condition" 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). If a hospital determines that an individual has an emergency medical condition, "the hospital must provide either (A) 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, or (B) for 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)(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). Under EMTALA, "to stabilize" means "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). "[T]ransfer" is defined to include discharge of a patient. *Id.* § 1395dd(e)(4). A hospital satisfies its obligations under EMTALA if, after being informed of the risks and benefits of treatment, the patient (or the patient's representative) does not consent to the treatment. *Id.* § 1395dd(b)(2).

In short, EMTALA requires that hospitals offer stabilizing treatment where "the health" of the patient is "in serious jeopardy," or where a condition could result in a "serious impairment to bodily functions" or a "serious dysfunction of any bodily organ or part." *Id.* § 1395dd(e)(1)(A)(i)-(iii). The hospital may also "transfer" such an individual, but only if the transfer meets certain requirements, *e.g.*, that the medical benefits of the transfer outweigh the risks. *Id.* § 1395dd(c)(1)(A)(ii).

EMTALA contains an express preemption provision, preserving state laws "except to the extent that the requirement directly conflicts with a requirement of this section." *Id.* § 1395dd(f). The intent of this provision was to preserve "stricter state laws," *i.e.*, state laws requiring emergency care *beyond* what EMTALA mandates. H.R. Rep. No. 99-241, Part 1, at 4 (1985); *see also* H.R. Rep. No. 99-241, Part 3, at 5 (1985) (expressing a desire to add "federal sanctions" as a supplement to state law duties "to provide necessary emergency care"); *Harry v. Marchant*, 291 F.3d 767, 773-74 (11th Cir. 2002). For purposes of EMTALA, "[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." *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993) (citations omitted) (per curiam); *accord Hardy v. N.Y.C. Health & Hosp. Corp.*, 164 F.3d 789, 795 (2d Cir. 1999).

C. Idaho Hospitals' Participation in Medicare and Their Agreements to Comply with EMTALA Obligations

As noted, a hospital participating in Medicare must comply with EMTALA as a condition of receiving federal funds. *See* 42 U.S.C. § 1395cc(a)(1)(I)(i). Additionally, hospitals enter into written agreements with the Secretary confirming they will comply with EMTALA.

Hospitals apply to become certified under Medicare by submitting a Centers for Medicare & Medicaid Services (CMS) Form 855, *see* Decl. of David R. Wright (attached hereto as Ex. E) ¶ 2, in which the provider "agree[s] to abide by the Medicare laws, regulations and program instructions that apply." CMS Form 855, § 15, ¶ A.3 (pg. 48), https://perma.cc/84T6-S2DP. If approved for Medicare certification, the hospital must then sign CMS Form 1561, Wright Decl. ¶ 4, in which the provider likewise "agrees to conform to the provisions of section of 1866 of the Social Security Act [42 U.S.C. § 1395cc] and applicable provisions in 42 CFR." https://perma.cc/5EPE-YLRE. Finally, each fiscal year, a Medicare-participating hospital must submit a cost report, pursuant to which "the Chief Financial Officer or hospital Administrator must certify that he or she is 'familiar with the laws and regulations regarding the provision of health care services, and that the services identified in this cost report were provided in compliance with such laws and regulations,' which include EMTALA." Wright Decl. ¶ 6; *see also* Decl. of Barbara Shadle (attached hereto as Ex. F) ¶¶ 2-5.

Within Idaho, there are 52 Medicare-certified hospitals, at least 39 of which provide emergency services. Wright Decl. ¶ 8. Of the 52 hospitals, 16 are government-owned, and at least 15 of those provide emergency services. *Id.* ¶ 9. These 52 hospitals in Idaho received approximately $3.4 billion in federal Medicare funds during fiscal years 2018-2020; by rough estimate, approximately $74 million was attributable to these hospitals' emergency departments. Shadle Decl. ¶ 6. That funding was conditioned on compliance with EMTALA. Wright Decl. ¶ 14.

II. Idaho's Abortion Law

In 2020, Idaho enacted a law that severely restricts abortion and threatens criminal prosecution against anyone who performs the procedure. The law, codified at Idaho Code § 18-622, is set to take effect August 25, 2022. *See* Idaho Code § 18-622(1)(a).

Under § 18-622, "[e]very person who performs or attempts to perform an abortion . . . commits the crime of criminal abortion," a felony punishable by two to five years imprisonment. *Id.*

§ 18-622(2). The 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.* 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).[1]

The *prima facie* criminal prohibition and license suspension provisions in Idaho's law do not contain any exceptions, including for when the pregnant patient's health or life is endangered. *See id.* § 18-622(2). Thus, the performance of an abortion—even in an emergency, life-saving scenario—would subject a provider to criminal prosecution and require the provider to assert one of the law's "affirmative defense[s]" at trial. *Id.* § 18-622(3). As relevant here, the accused physician would have to prove to a jury, by a preponderance of the evidence, 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," and 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)(ii)-(iii).

STANDARD OF REVIEW

The United States seeks a preliminary injunction against § 18-622's enforcement as applied to

[1] This definition of "abortion" in the Idaho Code is broad and covers some procedures that may not be characterized as an abortion in the medical community, including some circumstances in which a pregnancy is nonviable or termination of pregnancy is necessary to treat a pregnant patient's medical condition. *See* Fleisher Decl. ¶ 32, Ex. A-B. For purposes of this case, the United States uses the term "abortion" as it is defined under the Idaho Code.

EMTALA-mandated care. To obtain such preliminary relief, "a party must show: (1) it will likely succeed on the merits, (2) it will likely suffer irreparable harm in the absence of preliminary relief, (3) the balance of the equities tips in its favor, and (4) the public interest favors an injunction." *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 688 (9th Cir. 2022) (citation omitted).

ARGUMENT

I. The United States is Likely to Succeed in Demonstrating that EMTALA Preempts Idaho's Abortion Law

The United States has a clear likelihood of success on its claim. EMTALA requires hospitals with emergency departments to provide stabilizing treatment for emergency conditions. Physicians treating emergency conditions will sometimes determine that the medically necessary treatment involves or will result in the termination of a pregnancy. Idaho's law conflicts with EMTALA by subjecting physicians to criminal prosecution for terminating *any* pregnancy, irrespective of the medical circumstances. The law also imposes felony criminal liability on physicians who provide abortions, unless the physician is able to prove through an affirmative defense that (as relevant here) the abortion was "necessary to prevent the death of the pregnant woman"—which is far narrower than the standard EMTALA requires for the provision of medically necessary care. Thus, Idaho's abortion law conflicts directly with EMTALA, and is preempted in the context of EMTALA-mandated care.

A. EMTALA Requires Participating Hospitals to Provide Stabilizing Treatment, Which Includes Abortions for Some Medical Conditions

Under EMTALA, hospitals that receive Medicare funds are generally required (barring an appropriate transfer to another medical facility) to offer and provide "stabilizing treatment" to all patients who arrive at their emergency departments while experiencing an "emergency medical condition." 42 U.S.C. § 1395dd(b)(1). For such patients, hospitals are required to provide "further medical examination and such treatment as may be required to stabilize the medical condition." *Id.*

§ 1395dd(b)(1)(A); *see also* 42 C.F.R. § 489.24(a)(1)(i)-(ii).

Congress explicitly contemplated that pregnant patients would be among those arriving at an emergency department experiencing an "emergency medical condition." *Id.* § 1395dd(e)(1)(A)(i), (B). A number of conditions can arise during, or can be exacerbated by, pregnancy that may constitute "emergency medical conditions." For some patients, a physician will determine that the stabilizing treatment for the patient's emergency condition is termination of the pregnancy. Fleisher Decl. ¶¶ 12-27; Corrigan Decl. ¶¶ 8-30; Cooper Decl. ¶¶ 5-11; Seyb Decl. ¶¶ 6-12. For example, a pregnant patient may arrive at an emergency department with bleeding, pelvic pain, or severe abdominal pain that is being caused by an ectopic pregnancy, a condition in which a nonviable embryo implants outside the uterus, often in a fallopian tube, which can never lead to a live birth. Fleisher Decl. ¶ 13. This is an "emergency medical condition" because it could cause the fallopian tube to rupture, and the patient could bleed to death. *Id.* In most cases, the physician cannot reasonably know when that rupture will occur—rupture can occur within minutes, hours, or days of an ectopic-pregnancy diagnosis—but without immediate treatment it is reasonably probable that the patient's condition will continue to deteriorate. *Id.* Given the "serious risk of unknown imminence," and the inevitability that the patient's condition will deteriorate, the "appropriate stabilizing treatment is nearly always" termination of the pregnancy through surgery or medication. *Id.*

To take another example, a patient may arrive at an emergency room with nausea and shortness of breath, leading to a diagnosis of pre-eclampsia. Fleisher Decl. ¶ 17. Pre-eclampsia can "quickly progress to eclampsia, with the onset of seizures," that can result in a coma, pneumonia, kidney failure, stroke, or cardiac arrest. *Id.* In many cases, pre-eclampsia and eclampsia can be managed with medications that allow the fetus to mature. But in other cases (*e.g.*, situations in which the seizures cannot be controlled), a physician exercising her medical judgment will conclude that termination of the pregnancy is the necessary stabilizing treatment. *Id.* As Dr. Corrigan described, pre-eclampsia for

one patient caused "water on the lungs," which required an immediate termination of the pregnancy. Corrigan Decl. ¶¶ 27-29; Cooper Decl. ¶¶ 6-7 (pre-eclampsia placed patient at risk for stroke, seizure, and pulmonary edema); Seyb Decl. ¶¶ 9-10. A woman may also arrive at the emergency department with an infection after the amniotic sac surrounding the fetus ruptures. Fleisher Decl. ¶ 19. This condition can progress quickly into sepsis, at which point a patient's organs may begin to fail; like the other conditions discussed above, there are some circumstances in which termination of the pregnancy is the medically necessary treatment. *Id.*; Corrigan Decl. ¶¶ 11-17; Seyb Decl ¶¶ 7-8.

As a further example, a patient may arrive at the hospital with chest pain or shortness of breath, at which point a doctor discovers longstanding elevated blood pressure or a blood clot. Fleisher Decl. ¶ 15. Pregnancy can substantially exacerbate these conditions, and for some patients with severe symptoms, termination is the necessary treatment under EMTALA because there is a high probability of severe impairment of the lungs, heart, and kidneys without treatment. *Id.* Similarly, a patient may arrive at the hospital with vaginal bleeding caused by a placental abruption. *Id.* ¶ 20; Corrigan Decl. ¶¶ 21-25; Seyb Decl. ¶¶ 11-12. If the bleeding is uncontrollable, a physician may conclude that the stabilizing treatment includes termination of the pregnancy, in order to prevent the patient from going into shock which can result in organ dysfunction such as kidney failure. Fleisher Decl. ¶¶ 20-21.

These are just some of the emergency conditions that can place a pregnant patient's health in serious jeopardy or threaten bodily functions or organs. *Id.* ¶ 22. Despite these conditions' serious risks, it may not be possible for a physician to know whether treatment for any particular condition is "necessary to prevent the death" of the pregnant patient. *Id.* ¶¶ 13-21. Absent the stabilizing treatment EMTALA requires, however, the risk is extremely serious that, for example, a patient with an ectopic pregnancy might bleed to death, an infection could turn into sepsis and cause organ failure, seizures from eclampsia might prove uncontrollable, or a blood clot could lead to kidney failure. *Id.*

For each of these emergency medical conditions, where a physician determines that abortion

is the stabilizing treatment, EMTALA's plain text requires that treatment be offered and provided upon informed consent. Once a physician identifies that a pregnant individual suffers from an emergency medical condition, that individual must be offered "such treatment as may be required to stabilize the medical condition." 42 U.S.C. § 1395dd(b)(1)(A); *see also* 42 C.F.R. § 489.24(a)(1)(ii) ("If an emergency medical condition is determined to exist," the hospital must "provide any necessary stabilizing treatment[.]"). The only reasonable interpretation of EMTALA's text is that it requires hospitals to offer stabilizing treatment when medically necessary.

Nothing in EMTALA creates a different rule for circumstances in which the treatment results in termination of a pregnancy. The statute's text does not exempt any particular treatment (abortion or otherwise) from the ambit of stabilizing treatment. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020) ("[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."); *In the Matter of Baby K*, 16 F.3d 590, 596 (4th Cir. 1994) (finding no "statutory language or legislative history [in EMTALA] evincing a Congressional intent to create an exception to the duty to provide 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." *Arrington*, 237 F.3d at 1073-74 (citation omitted).

Any argument that EMTALA does not encompass abortions is foreclosed by the specific Affordable Care Act (ACA) provision addressing abortion. *See* 42 U.S.C. § 18023. The ACA allows States to prohibit abortion coverage in certain health plans, *id.* § 18023(a)(1), but the same provision contains a cross-reference to EMTALA and makes explicit that "[n]othing in this Act shall be construed to relieve any health care provider from providing emergency services as required by State or Federal law, including section 1867 of the Social Security Act (popularly known as 'EMTALA.')" *Id.* § 18023(d). Congress therefore left no doubt that EMTALA encompasses abortion services and

that a State may not override that requirement.

The Weldon Amendment, which is a frequently enacted appropriations provision that prohibits discrimination against certain entities that do not perform abortions, reflects the same understanding. The Weldon Amendment's sponsor, when confronted with a concern that "women will die because they will not have access to an abortion needed to save the life of the mother," expressly referenced EMTALA as addressing that concern: "Hyde-Weldon does nothing of the sort. It ensures that in situations where a mother's life is in danger a health provider must act to save the mother's life. In fact, Congress passed [EMTALA] forbidding critical-care health facilities to abandon patients in medical emergencies, and requires them to provide treatment to stabilize the medical condition of such patients—particularly pregnant women." 151 Cong. Rec. H177 (Jan. 25, 2005) (statement of Rep. Weldon).

More generally, when Congress creates special rules for abortion—or excludes abortion care from otherwise-applicable rules—it does so expressly.[2] "Had Congress likewise intended" to exempt abortions from EMTALA, "it knew how to say so." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018). Indeed, the very same legislation through which Congress considered EMTALA included a separate program that *did* expressly carve out abortion. *Compare* Consolidated Omnibus Reconciliation Act of 1985, H.R. 3128, 99th Cong., 1st Sess., § 124 (language that became EMTALA), *with id.* § 302(b)(2)(B) (expressly excluding abortion from a different program's authorized activities). Courts have also previously understood EMTALA to require abortion-related services. *See, e.g.*, *New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 538 (S.D.N.Y. 2019); *Morin v. E. Maine Med.*

[2] Examples of these abortion-specific provisions include 10 U.S.C. § 1093; 20 U.S.C. § 1688; 22 U.S.C. §§ 5453(b), 7704(e)(4); 25 U.S.C. § 1676; 42 U.S.C. §§ 238n, 280h-5(a)(3)(C), 300a-6, 300a-7, 300a-8, 300z-10, 1397ee(c)(7), 2996f(b)(8), and 12584a(a)(9). Congress has also routinely enacted a similar provision in appropriations laws, commonly referred to as the "Hyde Amendment." *See, e.g.*, Consolidated Appropriations Act, 2022, Div. H, Tit. V, §§ 506, 507, Pub. L. No. 117-103, 136 Stat. 49, 496 (2022); *cf. Harris v. McRae*, 448 U.S. 297, 302 (1980).

Ctr., 780 F. Supp. 2d 84, 96 (D. Me. 2010); *California v. United States*, No. 05-cv-328, 2008 WL 744840, at *4 (N.D. Cal. Mar. 18, 2008). Thus, both EMTALA's text and the surrounding statutory scheme confirm that EMTALA includes termination of the pregnancy as a potential stabilizing treatment.

To be sure, EMTALA separately provides that a pregnant person may have an "emergency medical condition" in circumstances in which "the health of [the] . . . unborn child . . . [is] in serious jeopardy." 42 U.S.C. § 1395dd(e)(1)(A)(i). That provision ensures that a hospital's EMTALA obligations extend to a scenario where the "unborn child's" health (and not the pregnant patient's health) is threatened. But nothing in the statutory text indicates that Congress intended to limit the EMTALA-mandated care to pregnant patients, or to require a provider to prioritize the fetus's health over the life or health of the pregnant patient. Instead, when a pregnant patient has an emergency medical condition and a physician concludes that stabilizing treatment would require termination of the pregnancy, EMTALA's text leaves that balancing to the pregnant patient—who may decide, after weighing the risks and benefits, whether to accept or refuse the treatment. *See id.* § 1395dd(b)(2) (acknowledging that "the individual" with an emergency medical condition, after being informed "of the risks and benefits" of treatment, may "refuse[] to consent to the . . . treatment"). There is therefore no conflict between EMTALA's provision respecting a pregnant patient and an "unborn child."

The statutory context further refutes any alternative interpretation that EMTALA's reference to "unborn child" *forecloses* abortion as a stabilizing treatment. That interpretation would mean that every time a hospital emergency room terminated a pregnancy to save a pregnant patient's life, the hospital committed an EMTALA violation—contrary to the consistent Congressional understanding reflected above. Moreover, that interpretation would mean that Congress, when enacting EMTALA in 1986, intended to prohibit hospitals from performing abortions, but only those abortions involving a threat to the pregnant patient's life or health. "Congress does not hide elephants in mouseholes," *Cyan, Inc. v. Beaver County Employees Ret. Fund*, 138 S. Ct. 1061, 1071-72 (2018), and the notion that

Congress intended EMTALA to forbid necessary medical care is fundamentally at odds with the statute's aim of guaranteeing—not prohibiting—emergency medical care. *See, e.g.*, 131 Cong. Rec. S13892 ("We cannot stand idly by and watch those Americans who lack the resources be shunted away from immediate and appropriate emergency care whenever and wherever it is needed.") (statement of Sen. Durenberger). In sum, Idaho cannot meaningfully dispute that EMTALA's requirement to offer stabilizing treatment includes abortion when a provider determines that treatment is medically necessary.

B. Idaho's Near-Absolute Abortion Ban Conflicts with EMTALA

Because Idaho's law makes it a crime to perform an abortion even when a physician concludes that such a procedure is the necessary stabilizing treatment under EMTALA, Idaho's law is preempted.

As EMTALA provides, "any State or local law requirement" is preempted "to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). This preemption provision encompasses both impossibility and obstacle preemption. *Draper*, 9 F.3d at 1393. Applying these principles to a state law that entitled physicians to forgo medical treatment that EMTALA would otherwise require, the Fourth Circuit found the analysis to be straightforward: "[T]o the extent that [the state law] exempts treating physicians in participating hospitals from providing care [under specified circumstances], it is preempted—it does not allow the physicians . . . to refuse to provide her with [stabilizing treatment]." *Matter of Baby K*, 16 F.3d at 597. Numerous courts have likewise found state laws preempted when they stood as obstacles to EMTALA's civil liability provisions. *See Root v. New Liberty Hosp. Dist.*, 209 F.3d 1068, 1070 (8th Cir. 2000) (Missouri state law preempted to the extent it sought to shield its state-operated hospitals from EMTALA liability); *Burditt v. HHS*, 934 F.2d 1362, 1373-74 (5th Cir. 1991) (physician could not avoid EMTALA liability by relying on state law contract principles, because "[w]e recognize no reason for conditioning the applicability of EMTALA's civil penalty provision on the vagaries of the several state laws"); *see also,*

e.g., *Cox v. Cabell Huntington Hosp., Inc.*, 863 F. Supp. 2d 568, 572 (S.D. W. Va. 2012); *Merce v. Greenwood*, 348 F. Supp. 2d 1271, 1277 (D. Utah 2004). Consistent with these decisions, Idaho's abortion law conflicts with EMTALA, and therefore is preempted, for three independent reasons.

First, Idaho law flatly prohibits—and attaches criminal penalties and loss of license to—medical care that EMTALA requires. It is thus impossible for Idaho medical providers to comply with both Idaho and federal law. The Idaho law establishes an affirmative defense for abortions "necessary to prevent the death of the pregnant woman," Idaho Code § 18-622(3)(a)(ii), but EMTALA requires necessary stabilizing treatment for any "emergency medical condition," which is broader than just those treatments necessary to prevent death. *See* 42 U.S.C. § 1395dd(e)(1)(A) (defining "emergency medical condition" to include conditions that "plac[e] the health of the individual . . . in serious jeopardy," threaten "serious impairment to bodily functions," or risk "serious dysfunction of any bodily organ or part"). Serious medical conditions exist that meet EMTALA's criteria but for which an abortion might not be necessary to prevent death. *See* Part I.A, *supra*; Fleisher Decl. ¶¶ 12-27. Because Idaho law criminalizes terminating a pregnancy in these circumstances, but federal law requires physicians to offer and provide such stabilizing treatment when medically necessary, it is impossible for physicians to comply with both laws; the Idaho law is therefore preempted. *See, e.g.*, *Chamber of Com. of U.S. v. Bonta*, 13 F.4th 766, 781 (9th Cir. 2021) ("An arbitration agreement cannot simultaneously be 'valid' under federal law and grounds for a criminal conviction under state law"); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1028 (9th Cir. 2013) (state law was preempted because it allowed "individuals [to] be prosecuted for conduct that Congress specifically sought to protect").

Second, even in circumstances for which Idaho offers an affirmative defense—where the procedure is "necessary to prevent the death of the pregnant woman," Idaho Code § 18-622(3)(a)(ii)—the affirmative defense structure *itself* "is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Draper*, 9 F.3d at 1394. The Idaho law allows physicians to be

prosecuted for performing *any* abortion, regardless of circumstances. Even where the affirmative defense would be satisfied, the Idaho law would still allow for indictment, arrest, and criminal prosecution of physicians each and every time a pregnancy is terminated—including when the physician determined that the procedure was necessary stabilizing treatment under EMTALA. Relegating any exception from criminal liability to an affirmative defense itself poses an obstacle to EMTALA's "overarching purpose of ensuring that patients . . . receive adequate emergency medical care," *Vargas By & Through Gallardo v. Del Puerto Hosp.*, 98 F.3d 1202, 1205 (9th Cir. 1996), because exposure to criminal prosecution will render physicians less inclined or entirely unwilling to risk providing treatment. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350-51 (2001) (holding that fear of being "expose[d] . . . to unpredictable civil liability" under state law, for conduct condoned by federal law, was sufficient for preemption); *Arizona v. United States*, 567 U.S. 387, 408 (2012) (preempting a state law authorizing the arrest of aliens, because "[t]he result could be unnecessary harassment of some aliens . . . who federal officials determine should not be removed").

Third, the Idaho law conflicts with EMTALA by threatening the licenses of medical professionals who perform or assist in providing an abortion. Fleisher Decl. ¶ 27; Corrigan Decl. ¶¶ 32-34; Cooper Decl. ¶ 12; Seyb Decl. ¶¶ 13-14. Specifically, beyond the physician who performs the abortion, *see* Idaho Code § 18-604(12), the Idaho law mandates that any "health care professional . . . 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.* § 18-622(2). This provision could apply to a number of personnel involved in emergency care, including nurses, pharmacists, physicians' assistants, and anesthesiologists. *Cf. id.* §§ 54-1401 (nursing licensure), 54-1718 (pharmacists), 54-1810 (physicians), 54-1810A (physicians' assistants).

Notably, these professionals' licenses can be revoked even for someone else's conduct,

because in any "disciplinary action by an applicable licensing authority," they must likewise prove the elements of the affirmative defense: that the physician appropriately determined the necessity of the abortion and the appropriate manner to perform it. *See* Idaho Code § 18-622(3)(a)(ii)-(iii). The obvious effect will be to discourage medical professionals from participating in *any* abortions. Even if a doctor *tells* a nurse, for example, that an abortion is necessary to prevent death or serious bodily harm, the nurse could still be subject to disciplinary action for assisting in the abortion, and potentially have their license revoked based on the disciplinary board's determination that the *doctor* erred in making a "good faith medical judgment" about how to treat the pregnant patient. *Id.* Thus, the Idaho law penalizes and deters medical professionals from participating in medically necessary abortions, contrary to EMTALA's "overarching purpose of ensuring that patients . . . receive adequate emergency medical care," *Vargas*, 98 F.3d at 1205.

For each of these reasons, § 18-622 conflicts directly with EMTALA, and the United States has demonstrated a likelihood of success on its preemption claim. Section 18-622 is therefore preempted to the extent it allows Idaho to initiate criminal prosecutions against, attempt to revoke the license of, or seek to impose any other form of liability on, medical providers with respect to EMTALA-covered care.

II. The Equitable Balance Supports Entry of a Preliminary Injunction

The remaining factors all support entry of a preliminary injunction, because allowing the Idaho law to take effect would result in irreparable harm to the public and to the United States' sovereign interests. *Cf. Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that, in suits involving the United States, the balance of equities and "public interest . . . factors merge").

First and most fundamentally, allowing the Idaho law to go into effect would threaten severe harm to pregnant patients in Idaho, who would no longer be guaranteed the critical emergency care to which they are entitled under federal law. *See Valle del Sol*, 732 F.3d at 1029 ("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." (modifications omitted)). As discussed above, numerous pregnancy-related conditions could require emergency care including abortion, and these conditions have occurred and will inevitably occur again within Idaho. Corrigan Decl. ¶¶ 8, 15, 23, 29; Cooper Decl. ¶¶ 5, 6, 8, 10, 12; Seyb Decl. ¶¶ 6, 7, 9, 11, 13. To take just one example, in Idaho, Medicaid has covered treatment for approximately 100 ectopic pregnancies each year. Fleisher Decl. ¶ 36. Medical literature also confirms that other diagnoses qualifying as "emergency medical conditions" for pregnant individuals also occur frequently. *Id.* ¶¶ 28-38. And Idaho-based physicians have personally treated patients with these types of conditions. Corrigan Decl. ¶ 8 (anticipating that "the number will increase"); Seyb Decl. ¶ 6 (treating "a dozen" per year); Cooper Decl. ¶ 5.

Given that Idaho has approximately 22,000 births per year,[3] and a large number of high-risk pregnancies due to surrogacy, it is virtually guaranteed that these emergency medical conditions will occur for a sizeable number of pregnant patients within Idaho. Corrigan Decl. ¶¶ 8, 19; Fleisher Decl. ¶¶ 36-38. Allowing the law to go fully into effect would discourage physicians from providing necessary care in emergency circumstances, resulting in significant and irreparable harm to numerous pregnant patients within Idaho. Every day that the law is in effect, there is a likelihood that some pregnant persons suffering medical emergencies will face irreversible health consequences, such as strokes and organ failure, and some are likely to die. *See* Fleisher Decl. ¶¶ 36-38; Corrigan Decl. ¶¶ 8, 17, 23-24, 29; Cooper Decl. ¶ 6, 8, 10, 12; Seyb Decl. ¶ 7, 9, 11, 13; *see also Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (irreparable harm "includes delayed and/or complete lack of necessary treatment, and increased pain and medical complications"); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) ("Plaintiffs have shown a risk of irreparable injury, since enforcement of the California rule may deny

[3] Idaho Dep't of Health & Welfare, *2010-2020 Idaho Resident Births*, *VS Natality – Data Results, 2010-2020*, https://www.gethealthy.dhw.idaho.gov/idaho-births-vital-statistics (attached as Ex. G-C).

them needed medical care.").

Indeed, patients in Idaho are already facing dire situations. Dr. Corrigan treated a patient who, after initially being denied care, arrived at the hospital two weeks later with an infection in her uterus, at risk of sepsis, and termination was necessary to preserve her life. Corrigan Decl. ¶¶ 12-15. And Dr. Seyb recently received a call from a physician whose patient was "clear[ly]" "in danger" due to severe bleeding, but the physician feared the ramifications of providing medically necessary care. Seyb. Decl. ¶ 13. Had § 18-622 been in effect, the life-saving treatment these patients received could have been further delayed or denied. Corrigan Decl. ¶¶ 31-35; Cooper Decl. ¶ 12; Seyb Decl. ¶¶ 13-14.

Moreover, Idaho's law also interferes with the United States' sovereign interest in ensuring the proper administration of federal law and the Medicare program. *See, e.g.*, *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("The United States suffers injury when its valid laws in a domain of federal authority are undermined by impermissible state regulations."); *cf. Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000). The United States has agreed to provide federal Medicare funds to hospitals in Idaho, in return for those hospitals promising (among other things) to comply with EMTALA for all patients, not just for Medicare beneficiaries. *See* 42 U.S.C. § 1395cc(a)(1)(I). But the Idaho law seeks to disrupt the 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. Thus, the Idaho law threatens "harm to the administration and integrity of Medicare," *United States v. Mackby*, 339 F.3d 1013, 1018 (9th Cir. 2003), because payments to hospitals will no longer guarantee the availability of services that Congress mandated. Wright Decl. ¶¶ 14, 16. This harm is substantial: the United States provided over $3 billion in Medicare funding to hospitals within Idaho over fiscal years 2018-2020, with approximately $74 million attributable to emergency departments. Shadle Decl. ¶¶ 6-8.

The Idaho law also interferes with the written agreements that the United States has entered

into with hospitals pursuant to Medicare. These Spending Clause agreements likewise require hospitals to comply with EMTALA. *See* Background, Part I.C, *supra*. It is well-settled that third parties may not interfere with the terms of Spending Clause legislation, *see Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 270 (1985), but here, the State of Idaho is directly interfering with the agreements between the United States and the 52 hospitals within Idaho that are receiving Medicare funds. Thus, irreparable harm exists on this basis as well.

Finally, on the other side of the ledger, the State of Idaho will suffer no cognizable harm as a result of the requested preliminary relief. Idaho's abortion law is not currently in effect, has never been in effect, and therefore enjoining it from going into effect, as applied to EMTALA-mandated care, would simply preserve the status quo during the short period necessary for further litigation. *See All. for Wild Rockies v. Pierson*, 550 F. Supp. 3d 894, 898 (D. Idaho 2021) ("The purpose of a preliminary injunction is to preserve the status quo and prevent the 'irreparable loss of rights' before a final judgment on the merits[.]"). Given the significant harms that would result if the Idaho law were to go into effect to prohibit EMTALA-mandated care—both for pregnant individuals as well as the United States' sovereign interests—and the corresponding lack of harm to the State of Idaho from a temporary injunction against certain applications of its law, the equitable factors plainly favor entry of preliminary relief against the Idaho law's enforcement.

CONCLUSION

For the foregoing reasons, the Court should enter a preliminary injunction prohibiting the State of Idaho—including all of its officers, employees, and agents—from enforcing Idaho Code § 18-622(2)-(3) as applied to EMTALA-mandated care.

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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

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
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) 514-5578
lisa.n.newman@usdoj.gov

Counsel for Plaintiff

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
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) 514-5578
lisa.n.newman@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 **MOTION FOR A PRELIMINARY INJUNCTION**

THE UNITED STATES'
MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff the United States of America respectfully moves for a preliminary injunction against the State of Idaho—including all of its officers, employees, and agents—prohibiting enforcement of Idaho Code § 18-622(2)-(3) as applied to EMTALA-mandated care. The United States' arguments in support of this motion are fully set forth in the attached memorandum of law and supporting declarations.

Dated: August 8, 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
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) 514-5578
lisa.n.newman@usdoj.gov

Counsel for Plaintiff

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 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	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: (208) 334-2400 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 IDAHO

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: 05/04/2023

Docket entry number of judgment or order you are appealing: 135

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? 23-35153

Your mailing address (if pro se):

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature /s/ Daniel W. Bower **Date** Jul 3, 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

Form 1 *Rev. 06/09/2022*

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):

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

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 83720−0036
208−334−5539
Fax: 208−334−5548
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
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Amicus

State of North Dakota represented by **Thomas Molnar Fisher**
(See above for address)
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Amicus

State of Oklahoma represented by **Thomas Molnar Fisher**
(See above for address)
LEAD ATTORNEY
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Amicus

State of South Carolina represented by **Thomas Molnar Fisher**
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State of South Dakota represented by **Thomas Molnar Fisher**
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PRO HAC VICE
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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
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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		CORRECTIVE ENTRY − The entry docket number 47 48 49 MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Shannon Rose Selden. filed by American Public Health Association, American College of Obstetricians and Gynecologists, Society for Maternal−Fetal Medicine, American Academy of Family Physicians, National Hispanic Medical Association, American College of Emergency Physicians, Idaho Chapter of the American College of Emergency Physicians, National Medical Association, American Medical Association,, American Academy of Pediatrics was filed incorrectly in this case. The filing parties shall re−submit their motions for pro hac and pay the filing fee.(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)

10/05/2022		The 60 day deadline has expired. Case will remain with a District Judge. No more notice of availability or assignment will be sent out. Consent deadline(s) termed. (alw)
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)

01/13/2023		NOTICE TO COURT that counsel Dayton Reed wishes to no longer be noticed electronically on this case as of the date of this notice. (Reed, Dayton)
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)
05/04/2023	134	DOCKET ENTRY ORDER granting 128 the State of Idaho's Request to Take Judicial Notice, under Federal Rule of Evidence 201, that the Idaho Supreme Courts Planned Parenthood decision released January 5, 2023, Dkt. 119−2, is now final. 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)

05/04/2023	135	MEMORANDUM DECISION AND ORDER. IT IS ORDERED that: (1) the Idaho Legislatures Motion for Reconsideration of Order Granting Preliminary Injunction (Dkt. 97) is DENIED; and (2) the State of Idahos Motion to Reconsider Preliminary Injunction (Dkt. 101) 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)
06/28/2023	136	NOTICE OF APPEAL (USCA 23−35440) as to 95 Order on Motion for Preliminary Injunction, 135 Order on Motion for Reconsideration,,, by State of Idaho. Filing Fee Due. $ 505, receipt number AIDDC−2590508. (Notice sent to Court Reporter & 9th Cir) (Wilson, Lincoln) Modified on 6/29/2023 to add 9CCA case number (hs).
06/28/2023	137	USCA Case Number 23−35440 for 136 Notice of Appeal, filed by State of Idaho. (hs) (Entered: 06/29/2023)
07/03/2023	138	NOTICE OF APPEAL (23−35450) 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 Due. $ 505, receipt number AIDDC−2592636. (Notice sent to Court Reporter & 9th Cir) (Bower, Daniel) Modified on 7/5/2023 to add 9CCA Case Number (km).
07/03/2023	139	TRANSCRIPT REQUEST by State of Idaho for proceedings held on 8/22/2022 before Judge Winmill, (Notice sent by e−mail to Court Reporter) (Church, Brian)
07/03/2023	140	MOTION to Stay *Preliminary Injunction Pending Appeal* 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 7/24/2023 (Attachments: # 1 Memorandum in Support Legislature's Memo ISO Stay)(Bower, Daniel)
07/03/2023	141	USCA Case Number 23−35450 for 138 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. (km) (Additional attachment(s) added on 7/5/2023: # 1 Notice to Review Party and Counsel Listing, # 2 Mediation Letter) (km). (Entered: 07/05/2023)
07/05/2023	142	TRANSCRIPT REQUEST by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty−Sixth Idaho Legislature for proceedings held on 08/22/2022 before Judge Winmill, (Notice sent by e−mail to Court Reporter) (Bower, Daniel)
07/06/2023	143	NOTICE by State of Idaho *of Withdrawal of Counsel* (Callahan, Joan)
07/24/2023	144	MEMORANDUM in Opposition re 140 MOTION to Stay *Preliminary Injunction Pending Appeal* filed by United States of America. Replies due by 8/7/2023. (Attachments: # 1 Exhibit Exhibit A)(Deffebach, Anna)