APP NO. 23A-_____

In the Supreme Court of the United States

STATE OF IDAHO,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

EMERGENCY APPLICATION FOR A STAY PENDING APPEAL

CHARLES J. COOPER
DAVID H. THOMPSON
PETER A. PATTERSON
MEGAN M. WOLD
COOPER & KIRK PLLC
1523 New Hampshire Ave. NW
Washington, DC 20036

JOHN J. BURSCH
ERIN M. HAWLEY
MATTHEW S. BOWMAN
LINCOLN DAVIS WILSON
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001

RAÚL R. LABRADOR
ATTORNEY GENERAL
JOSHUA N. TURNER
ACTING SOLICITOR GENERAL
Counsel of Record
JAMES E.M. CRAIG
BRIAN V. CHURCH
OFFICE OF THE IDAHO
ATTORNEY GENERAL
700 W Jefferson St #210
Boise, ID 83720
josh.turner@ag.idaho.gov
(208) 332-3548

JAMES A. CAMPBELL
JULIE MARIE BLAKE
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy.
Lansdowne, VA 20176

Counsel for Applicant State of Idaho

PARTIES TO THE PROCEEDING

The Applicant is the State of Idaho (defendant-appellant below).

The Respondent is the United States of America (plaintiff-appellee below).

Mike Moyle, Speaker of the Idaho House of Representatives; Chuck Winder, President Pro Tempore of the Idaho Senate; and The Sixty-Seventh Idaho Legislature are proposed intervenors and appellants below.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, Nos. 23-35440, 23-35450, *United States of America* v. *State of Idaho* v. *Mike Moyle et al.*, order entered November 13, 2023.

U.S. District Court for the District of Idaho, No. 1:22-cv-00329-BLW, *United States of America* v. *State of Idaho* v. *Mike Moyle et al.*, order entered May 4, 2023.

DECISIONS BELOW

The district court's decision granting a preliminary injunction is published at 623 F. Supp. 3d 1096 and is reprinted at Appendix ("App.") A. The district court's decision denying reconsideration of that order is available at 2023 WL 3284977 (D. Idaho May 4, 2023) and is reprinted at App.B. The Ninth Circuit's panel order granting the Legislature's motion to stay pending appeal is published at 83 F.4th 1130 and is reprinted at App.C. The Ninth Circuit's order granting reconsideration en banc is published at 82 F.4th 1296 and is reprinted at App.D. The Ninth Circuit's unreported en banc order denying the motion to stay the injunction pending appeal is reprinted at App.E.

JURISDICTION

The United States filed its complaint here on August 2, 2022. *United States* v. *State of Idaho*, No. 1:22-cv-00329-BLW, ECF 1. The United States filed a motion for preliminary injunction and the Idaho Legislature filed an expedited motion to intervene. *Id.*, ECF 15, 17. The district court granted the United States' motion for preliminary injunction on August 24, 2022, *id.*, ECF 95 (App.A), and the Legislature and the State moved for reconsideration on September 7 and September 21, 2022, respectively. *Id.*, ECF 97, 101. The district court denied reconsideration on May 4, 2023. *Id.*, ECF 135 (App.B). The State and the Legislature filed timely notices of appeal on June 28 and July 3, 2023, respectively, and the Legislature moved to stay the injunction pending appeal. *Id.*, ECF 136, 138, 140. A Ninth Circuit panel issued a published opinion granting a stay of the injunction pending appeal on September 28, 2023. *United States* v. *State of Idaho*, No. 23-35440 (9th Cir.), ECF 59 (App.C). The United States moved for emergency reconsideration en banc on September 30, 2023, *id.*, ECF 54, which the Ninth Circuit granted on October 10, 2023, vacating the panel order. *Id.*, ECF 69 (App.D). The en banc Ninth Circuit then denied the motion to stay pending appeal on November 13, 2023. *Id.*, ECF 73 (App.E).

This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 2101(f), and Supreme Court Rule 23. Per Supreme Court Rule 23.3, the State is a party to the judgment sought to be reviewed and the relief now requested was first sought in the court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

To the Honorable Elena Kagan, as Circuit Justice for the Ninth Circuit:

The State of Idaho moves for a stay pending appeal of a district court injunction holding that the federal Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, preempts Idaho's Defense of Life Act, Idaho Code § 18-622.

Idaho's Defense of Life Act (the "Act") imposes penalties on physicians who perform prohibited abortions unless "[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." Idaho Code § 18-622(2)(a)(i). As the Idaho Supreme Court has authoritatively interpreted the Act, this language "leaves wide room for the physician's 'good faith medical judgment'" as to whether an abortion is necessary to save a woman's life. *Planned Parenthood Great Nw.* v. *State*, 522 P.3d 1132, 1203 (Idaho 2023). It "does not require *objective* certainty, or a particular level of immediacy," before the exception applies because the Act "uses broad language to allow for the clinical judgment that physicians are routinely called upon to make for proper treatment of their patients." *Ibid.* Additionally, under the definitions applicable to the Act, "[t]he removal of an ectopic or molar pregnancy" is not an abortion, nor is the removal "of a dead unborn child," as in the case of a miscarriage. Idaho Code § 18-604(1).

After this Court "return[ed] the issue of abortion to the people's elected representatives" in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2243 (2022), the United States sued the State of Idaho claiming that an ancillary provision of the federal Medicare statute—EMTALA—preempts Idaho's Act.

EMTALA requires hospitals to provide stabilizing care to emergency room patients, regardless of their ability to pay. Yet after *Dobbs*, the United States adopted the novel view that EMTALA creates a federal right to abortion in emergency rooms, even though EMTALA is silent on abortion and actually requires stabilizing treatment for the unborn children of pregnant women. The United States' position conflicts with the universal agreement of federal courts of appeals that EMTALA does *not* dictate a federal standard of care or displace state medical standards.

The district court accepted the United States' revisionist, post-*Dobbs* reading of EMTALA and enjoined Idaho's Defense of Life Act in emergency rooms. The district court's injunction effectively turns EMTALA's protection for the uninsured into a federal super-statute on the issue of abortion, one that strips Idaho of its sovereign interest in protecting innocent human life and turns emergency rooms into a federal enclave where state standards of care do not apply. A district court in Texas has rightfully rejected this view, and Texas's abortion laws remain unrestrained by EMTALA while that case is pending before the Fifth Circuit. Yet Idaho's law is enjoined as preempted by EMTALA—an ongoing violation of both Idaho's sovereignty and its traditional police power over medical practice. The Court should stay the district court's erroneous preliminary injunction.

In fact, a Ninth Circuit motion panel has already so held, issuing a unanimous opinion staying the district court's injunction pending appeal. App.C, (VanDyke, J., joined by Lee & Bade, J.J.). Yet the en banc Ninth Circuit has taken the extraordinary step of vacating that unanimous order and granting en banc review even before the

panel ruled on the merits—with no explanation and over the dissent of four judges. The en banc court's silent disposition of this critical question not only conflicts with a vast chorus of circuit precedent holding that EMTALA does not create a federal standard of care but also may soon be in conflict with the Fifth Circuit on the narrower question of whether EMTALA requires abortions. *Texas* v. *Becerra*, 23-10246 (5th Cir. Nov. 7, 2023) (argument before Southwick, Engelhardt & Wilson, J.J.). The Court should stay the district court's injunction pending appeal or grant certiorari before judgment on this exceptionally important question. See *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022) (deferring application to vacate injunction and granting certiorari before judgment).

STATEMENT OF THE CASE

A. Congress Enacts EMTALA To Prevent "Patient Dumping."

Nearly 40 years ago, Congress enacted EMTALA to address the concern "that hospitals were dumping patients who were unable to pay for care, either by refusing to provide emergency treatment to these patients, or by transferring the patients to other hospitals before the patients' conditions stabilized." *Jackson* v. *East Bay Hosp.*, 246 F.3d 1248, 1254 (9th Cir. 2001) (citing H.R. Rep. No. 241, 99th Cong., 1st Sess., Part I, at 27 (1985), reprinted in 1986 U.S.C.C.A.N. 579, 605). EMTALA thus imposes various obligations on Medicare-participating hospital emergency departments, including stabilizing treatment or an appropriate transfer to a patient who presents with an emergency medical condition. Sensibly, a hospital's treatment obligations are limited to the hospital's capabilities: "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." 42 U.S.C. § 1395dd(b)(1).

For its entire history up to this case, EMTALA has been construed consistent with this narrow, statutory purpose. Every court of appeals to address the issue—including the Ninth Circuit—has resisted attempts to read EMTALA as providing "a national standard of care." *Bryant* v. *Adventist Health System/West*, 289 F.3d 1162, 1166 (9th Cir. 2002).[1] Instead, the courts of appeals recognize that the statute requires only that hospitals treat indigent patients the same as they treat anyone else. *Summers* v. *Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1138 (8th Cir. 1996) (en banc). EMTALA thus does not, in the main, require any specific treatments for stabilizing care, but leaves those questions to state law. In fact, the only specific care the statute demands is to *deliver*—not abort—the child of a woman in labor, treating medical emergencies faced by "the unborn child" of a pregnant woman no differently than emergencies faced by the woman herself. 42 U.S.C. § 1395dd(e)(1)(A).

---

[1] The courts of appeals uniformly hold that EMTALA does *not* create a national standard of care to support a malpractice claim. See *Gatewood* v. *Washington Healthcare Corp.*, 933 F.2d 1037, 1038–39 (D.C.Cir.1991); *Correa* v. *Hosp. San Francisco*, 69 F.3d 1184, 1192 (1st Cir.1995); *Hardy* v. *N.Y.C. Health & Hosp. Corp.*, 164 F.3d 789, 792–93 (2d Cir. 1999); *Byrne* v. *Cleveland Clinic*, 519 F. App'x 739, 742 (3d Cir. 2013); *Vickers* v. *Nash General Hosp., Inc.*, 78 F.3d 139, 142 (4th Cir.1996); *Cleland* v. *Bronson Health Care Grp., Inc.*, 917 F.2d 266, 268, 272 (6th Cir.1990); *Nartey* v. *Franciscan Health Hosp.*, 2 F.4th 1020, 1025 (7th Cir. 2021); *Summers*, 91 F.3d at 1136–37; *Eberhardt* v. *City of Los Angeles*, 62 F.3d 1253, 1258 (9th Cir. 1995); *Urban By and Through Urban* v. *King*, 43 F.3d 523, 525 (10th Cir.1994); *Holcomb* v. *Monahan*, 30 F.3d 116, 117 & n.2 (11th Cir.1994). Only the Federal Circuit has not addressed the question.

B. Following *Dobbs*, Idaho's Defense Of Life Act Goes Into Effect.

For more than 100 years, the people of Idaho have desired—upon recurring democratic consideration—that abortion should generally be permitted only if necessary to save or preserve the life of the pregnant mother. *Planned Parenthood Great Nw.*, 522 P.3d at 1149–50 (citing Act of Feb. 4, 1864, ch. IV, § 42, 1863-64 Idaho Terr. Sess. Laws 443; Act of Dec. 23, 1864, ch. III, § 42, 1864 Idaho Terr. Sess. Laws 305; Act of Jan. 14, 1875, ch. IV, § 42, 1874-75 Idaho Terr. Sess. Laws 328; Idaho Rev. Stat. §§ 6794, 6795 (1887)). The Legislature has expressed this will through a statutory finding, governing all of Idaho law, that the "life of each human being begins at fertilization, and preborn children have interests in life, health, and well-being that should be protected." Idaho Code § 18-8802(1).

Consistent with this statutory finding, in 2020, Idaho enacted a statute now known as the Defense of Life Act, Idaho Code § 18-622. The Defense of Life Act imposes penalties on doctors performing most abortions, to be triggered thirty days after any judgment by which the U.S. Supreme Court "restores to the states their authority to prohibit abortion." 2020 Idaho Sess. Laws 827. As originally enacted, the Act created an affirmative defense for a physician performing an abortion where the "abortion was necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(3)(a)(i)–(iii) (2020). The Act became effective when this Court held in *Dobbs* that "the authority to regulate abortion must be returned to the people and their elected representatives." 142 S. Ct. at 2279.

C. The United States Reinterprets EMTALA And Sues Idaho.

The United States responded much differently to *Dobbs*. President Biden decried this Court's decision, but he at first acknowledged that the people—not his administration—had "the final word" on the subject. *Remarks by President Biden on the Supreme Court Decision to Overturn Roe* v. *Wade*, THE WHITE HOUSE (June 24, 2022). Yet only two weeks later, the President abandoned that democratic stance and issued an executive order directing the Department of Health and Human Services to federalize the issue of abortion. *Protecting Access to Reproductive Healthcare Services*, Exec. Order No. 14076, 87 Fed. Reg. 42053-54 (July 8, 2022).

Days later, he got results. The President purported to have found a source for an abortion right in EMTALA, where it had apparently been dormant for 36 years. HHS promptly issued novel "guidance" stating that EMTALA preempts any state law that prohibits abortion without "an exception for the life of the pregnant person." *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss*, CMS (July 11, 2022). HHS purported to "remind" hospitals receiving Medicare funds of a position it had never before stated—that, regardless of state laws protecting the unborn, EMTALA requires emergency room doctors to perform or complete abortions, including "incomplete" chemical-induced abortions. *Ibid*. Texas and two national groups of physicians sued HHS and obtained a preliminary injunction against the "guidance," *Texas* v. *Becerra*, 623 F. Supp. 3d 696, 704 (N.D. Tex. 2022), which is on appeal to the Fifth Circuit, now fully submitted. *Texas* v. *Becerra*, 23-10246 (5th Cir. Nov. 7, 2023).

Shortly after issuing the HHS memorandum, the United States sued Idaho, seeking to enjoin the Defense of Life Act as preempted by EMTALA. *United States* v. *State of Idaho*, No. 1:22-cv-00329-BLW, ECF 1. The Legislature successfully moved to intervene and the United States moved for a preliminary injunction. *Id.*, ECF 15, 17.

D. The District Court Enjoins The Defense Of Life Act.

The United States' claims were novel in procedure as well as substance. Though EMTALA governs obligations on hospitals that accept Medicare funds, it was not hospitals that brought the claims. Rather, the United States itself sued, seeking a declaratory judgment to enforce the Supremacy Clause. The district court granted an injunction. It held that the Defense of Life Act was preempted by EMTALA for abortions 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." App.A.39 (quotation omitted).

E. Idaho Amends The Defense Of Life Act.

Both the State and the Legislature moved for reconsideration.

While those motions were pending, the Idaho Supreme Court issued its authoritative interpretation of the Defense of Life Act, which it upheld in all respects as a matter of state law. *Planned Parenthood Great Nw.*, 522 P.3d at 1203. The Idaho Supreme Court clarified that: removing an ectopic pregnancy is not a prohibited abortion under the Act; the Act does not require "certainty" of physicians; and the Act

gives wide berth for physicians to act in their judgment where necessary to save a pregnant woman's life. *Id.* at 1202–03. In the next legislative session, the Idaho legislature then amended the Act to codify the Idaho Supreme Court's clarification on ectopic pregnancies and to recharacterize the Act's "life-saving" language as an exception to the Act's prohibition on abortion, rather than an affirmative defense. Idaho Code § 18-622 (2023).

Despite these developments, the district court denied reconsideration. App.B.11.

F. A Ninth Circuit Panel Stays The District Court's Injunction.

Both the State and the Legislature appealed, and the Legislature simultaneously moved to stay the injunction pending appeal. In a published order, a unanimous Ninth Circuit panel (Van Dyke, J., joined by Bade & Lee, J.J.) granted a stay pending appeal. The panel concluded that "EMTALA does not preempt" Idaho's Defense of Life Act because there is no conflict between EMTALA and the Act and the Act poses no obstacle to EMTALA's purpose. App.C.7, 13.

The panel determined that conflict preemption did not exist for several reasons. First, EMTALA "does not set standards of care or specifically mandate that certain procedures, such as abortion, be offered." *Id.* at 7. Second, "[e]ven assuming that EMTALA did require abortions in certain, limited circumstances, it would not require abortions that are punishable by section 622." *Id.* at 7–8. Further, no conflict preemption existed because Congress did not intend EMTALA to supersede "the historic police powers of the States," including the right to prohibit abortion, *id.* at 9.

The panel also concluded that there was no obstacle preemption between the Act and EMTALA. Congress enacted EMTALA not "to create a national standard of care for hospitals," but "to respond to the specific problem of hospital emergency rooms refusing to treat patients who were uninsured or who could otherwise not pay for treatment." *Id*. at 13 (cleaned up). Because of this, the Act's "limitations on abortion services do not pose an obstacle to EMTALA's purpose because they do not interfere with the provision of emergency medical services to indigent patients." *Id*. at 14.

The panel further concluded that the remaining stay factors were met. The State would be irreparably harmed absent a stay because it was enjoined from effectuated the Act enacted by Idahoans through their elected representatives. *Id*. at 14–16. The balance of equities also favored a stay because "the federal government has no discernable interest in regulating the internal medical affairs of the State, and the public interest is best served by preserving the force and effect of a duly enacted Idaho law during the pendency of this appeal." *Id*. at 17–18.

G. The En Banc Ninth Circuit Vacates The Stay.

Within days of the panel's stay decision, the en banc Ninth Circuit took the rare step of vacating the Ninth Circuit panel's stay opinion and granting en banc review even before the panel had issued a merits opinion. App.D.1. The en banc court substituted the unanimous panel opinion with a peremptory denial of the stay motion over four dissents. App.E.1.

To preserve its sovereign right to enact its own laws and protect paramount state interests in maternal and fetal health, the State now moves this Court under Supreme Court Rule 23 for a stay of the district-court injunction pending appeal.

ARGUMENT

A stay pending appeal hinges on four well-settled factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). Here, these factors weigh decisively in favor of a stay.

I. The Ninth Circuit's Unexplained En Banc Order Warrants A Stay.

At the outset, the Court should grant a stay because the en banc Ninth Circuit provided no reason for denying one, even while it took the extraordinary step of pulling the case away from a panel that had thoroughly considered the merits of Idaho's stay application. App.E.2. That unanimous panel had issued a thorough, published order explaining its reasons for granting the stay, App.C, and four dissenters on the en banc court would have followed that order and stayed the district court's preliminary injunction. App.E.2 (Callahan, Miller, Bress & VanDyke, J.J., dissenting). But despite the panel's carefully reasoned order rejecting the United States' preemption theory on the merits, "one searches" the en banc court's order "in vain for any mention" of the United States' "likelihood of success" on that point. *Munaf* v. *Geren*, 553 U.S. 674, 690 (2008). Nor did the en banc court's one-sentence

grant of a stay delve into the equities for a stay, even though the very purpose of "interim equitable relief" is to "balance the equities as the litigation moves forward." *Trump* v. *Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam).

The en banc court's silence is reason enough for this Court to grant a stay. *Munaf*, 553 U.S. at 690. Courts must undertake a "proper consideration" of each factor before deciding to issue the extraordinary remedy of injunctive relief. *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). And they must show their work so that it can be reviewed. *Purcell* v. *Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam). Unexplained orders, in contrast, suggest that a court has exercised "WILL instead of JUDGMENT." *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., Rehnquist, C.J., O'Connor, J., concurring) (citation omitted).

This Court has vacated an injunction pending appeal that "fail[ed] to provide any factual findings or … any reasoning of its own," much less an explanation "showing the ruling and findings of the District Court to be incorrect." *Purcell*, 549 U.S. at 5. The need for an explanation is even more acute here given the suspect legal foundation for the United States' post-*Dobbs* interpretation of EMTALA and the well-established Ninth Circuit precedent rejecting an expansive interpretation of EMTALA's preemptive sweep. *Draper* v. *Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993) (per curiam); *Baker* v. *Adventist Health, Inc.*, 260 F.3d 987, 993 (9th Cir. 2001). That the en banc court offered no basis to differ with, much less vacate, the panel's well-reasoned stay order is alone grounds to reaffirm that panel decision and grant a stay of the en banc Ninth Circuit's perfunctory order to the contrary.

II. Idaho Is Likely To Succeed On The Merits.

The United States failed to make the showing required to support the district court's extraordinary injunction. To prevail on its attempt to enjoin Idaho law as preempted, the United States must meet a series of hurdles. It cannot surmount any of them, much less all of them.

For starters, the district court lacked authority to enter the Government's requested injunction. Because the Government relies on no statutory cause of action to support its suit, it must rest on the federal courts' general equitable authority to enjoin unlawful exercises of government power. But that authority has limits. One such limit is that courts cannot grant equitable relief when Congress has expressed an "intent to foreclose" it. *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 328 (2015). Here, Congress has done just that by establishing a detailed scheme for enforcing EMTALA. First, the federal government is given powerful enforcement tools, including the authority to impose civil monetary penalties against hospitals and physicians and to exclude them from future participation in Medicare programs. See 42 U.S.C. § 1395dd(d)(1). Second, injured individuals and medical facilities are granted a private right of action to obtain both damages and equitable relief. *Id.* § 1395dd(d)(2). "[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Armstrong*, 575 U.S. at 328. Here, Congress has provided two such methods. The courts do not have equitable authority to create a third.

Regarding the merits, an injunction "is an extraordinary remedy," *Winter*, 555 U.S. at 24, and may be awarded only "upon a clear showing that the plaintiff" deserves it. *Id.* at 22. That is especially true when the plaintiff seeks to enjoin the "enforcement of a presumptively valid state statute," *Brown* v. *Gilmore*, 122 S. Ct. 1, 2 (2001) (Rehnquist, C.J., in chambers), which "demands" unusually strong "justification." *Lux* v. *Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (cleaned up).

The injunction standard is even tougher for claims based on preemption. Preemption analysis starts with the "assumption that the historic police powers of the States"—including their power to impose medical standards of care—do not yield to federal law apart from "the clear and manifest purpose of Congress." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). That presumption against preemption is particularly strong because EMTALA is subject to two savings clauses—one in the Medicare Act, 42 U.S.C. § 1395, and another in EMTALA itself. 42 U.S.C. § 1395dd(f). The Medicare Act states that "[n]othing in this subchapter"—a subchapter that includes EMTALA—"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. And EMTALA expressly states that EMTALA does "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).

And still further, the United States must meet yet another hurdle because EMTALA is Spending Clause legislation under the Medicare Act. Thus, this Court will read Congress's intent to have imposed "a condition on the grant of federal moneys" only if Congress does so "unambiguously." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981).

All of this means, as the Ninth Circuit previously held, that EMTALA's "preemptive effect" must be construed "as narrowly as possible." *Draper*, 9 F.3d at 1393 (citation omitted); accord *Baker*, 260 F.3d at 993. So state law "directly conflicts" with EMTALA in only two situations: (1) if it is impossible to comply with both, or (2) if state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." App.C.7 (quoting *Draper*, 9 F.3d at 1393). Neither is the case here.

A. It Is Not Impossible To Comply With EMTALA And Idaho Law.

The United States' impossibility argument misinterprets both state and federal law. The United States is wrong that EMTALA requires abortions. Nothing in the statute or the caselaw supports that view—to the contrary, EMTALA treats an unborn child as a *patient*. Indeed, EMTALA expressly demands that the child of a pregnant woman in labor be *delivered*, 42 U.S.C. § 1395dd(e)(3)(A), independently treating emergency medical conditions of an "unborn child" no differently than conditions of a pregnant woman. 42 U.S.C. § 1395dd(e)(1)(A)(i). EMTALA does not require anything that Idaho law prohibits, and the United States' impossibility preemption theory fails.

The United States' preemption theory hangs on the premise that EMTALA requires hospitals to perform abortions. In the United States' telling, EMTALA mandates an emergency room abortion whenever a "relevant professional determines such care is necessary." App.C.9 (quotation omitted). That premise is meritless.

EMTALA does not even mention abortion. That statutory "silence" alone "is powerful evidence that Congress did not intend" to preempt state abortion laws, see *Wyeth* v. *Levine*, 555 U.S. 555, 575 (2009), particularly given EMTALA's savings clause. It would be "odd indeed" if Congress had tucked authority to negate the enforcement of state abortion laws in "a relatively obscure provision" of the Medicare Act. See *Sackett v. EPA*, 598 U.S. 651, 677 (2023). And of course, President Reagan and Congress enacted no such thing in 1986. Rather, the United States seeks to "discover in a long-extant statute an unheralded power to regulate" abortion, *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014), claiming for itself a power to address one of the most contentious social, political, and cultural decisions without a word to that effect from Congress. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2605 (2022). EMTALA's statutory silence on abortion thus impugns the United States' broad invocation of authority in the HHS memorandum and also prevents it from satisfying the Spending Clause requirement to impose its conditions on funding "unambiguously." *Pennhurst*, 451 U.S. at 17. The statute does not contain any demand for abortion, much less an unambiguous one.

The United States discerns an abortion demand in EMTALA's requirement to stabilize patients who present with an emergency medical condition. EMTALA

defines an emergency medical condition as a condition that will reasonably place "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." 42 U.S.C. § 1395dd(e)(1)(A) (omissions removed). And if an emergency medical condition exists, EMTALA requires the hospital to either provide stabilizing care to the patient "within the staff and facilities available at the hospital" or transfer the patient to another facility as provided by the statute. *Id.* § 1395dd(b)(1). So as the United States reasons, EMTALA requires stabilizing care for emergencies, and some physicians may believe abortion is appropriate stabilizing care, therefore, EMTALA requires abortion. But this syllogism flouts "the text and structure of the statute" on which the government's preemption theory hangs. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). It fails in three critical respects.

EMTALA does not interfere with state regulation of medicine. On a structural level, the Medicare Act—of which EMTALA is a part—states that it "shall [not] be construed" to interfere with "the practice of medicine or the manner in which medical services are provided." 42 U.S.C. § 1395. Regulating those standards of care is one of "the historic police powers of the States" that federal law is presumed not to displace. *Medtronic*, 518 U.S. at 485. This framing provision underscores the "congressional policy against the involvement of federal personnel in medical treatment decisions," *United States* v. *Univ. Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 160 (2d Cir. 1984), which is why Congress prohibited HHS from "direct[ing] or

prohibit[ing] any [particular] kind of treatment or diagnosis" in administering the Medicare regime. *Goodman* v. *Sullivan*, 891 F.2d 449, 451 (2d Cir. 1989) (per curiam).

So EMTALA cannot be construed to demand specific procedures that the rest of the statute disavows. Indeed, EMTALA is entirely consistent with the Medicare Act's broader principle of leaving state standards of care intact. This can be seen through a textual analysis of the statute. The statute begins by requiring hospitals to screen patients who come to the emergency department "to determine whether or not an emergency medical condition … exists." 42 U.S.C. § 1395dd(a). If the hospital determines that such a condition does exist, the hospital then "must provide either … 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 … for transfer of the individual to another medical facility." *Id.* §1395dd(b)(1) (emphasis added). EMTALA's directive that hospitals provide "such treatment as may be required to stabilize the medical condition" is best interpreted to mean such treatment *among those treatments that are authorized under both state and federal law*. *Id.* § 1395dd(b)(1).

There is nothing in the statute indicating that it is meant to *trump* the state's otherwise applicable standards of care. For example, if a person presented with a condition that without immediate treatment could result in "serious impairment to bodily functions," *id.* § 1395dd(e)(1)(A)(ii), and the attending physician believed that condition could be stabilized with an experimental medication that had not yet been approved for use by doctors, EMTALA would not authorize or require that the

medication be prescribed anyway. And the same answer obtains when the treatment is an abortion—or any other treatment—that is inconsistent with the governing standards of care in the state in which a hospital is located. EMTALA ensures that patients are not *denied* treatments that are authorized under state law because of an inability to pay. It does not ensure that patients are offered unauthorized treatments. It simply is not possible for state laws governing the substantive standards of care in a state to "directly conflict[ ] with a requirement" of EMTALA, *id.* § 1395dd(f), because EMTALA takes those standards of care as it finds them in state law.

EMTALA requires only what is "available at the hospital." EMTALA further implements the principle of state control over medicine in its plain text. The only stabilizing treatment EMTALA requires is what is "available at the hospital," 42 U.S.C. § 1395dd(b)(1)(A); 42 C.F.R. § 489.24(d)(i), and the only screening it requires is what is "within the capability of the hospital's emergency department," including "routinely available" ancillary services. 42 U.S.C. § 1395dd(a); *Eberhardt* v. *City of Los Angeles*, 62 F.3d 1253, 1258 (9th Cir. 1995). Based on this language, a full chorus of circuits—including the Ninth Circuit in *Eberhardt*—have unsurprisingly refused to interpret EMTALA as imposing a federal standard of care, see *supra* note 1, and have instead construed it in accord with its purpose to prevent "the practice of refusing to treat patients who are unable to pay." *Marshall ex rel. Marshall* v. *E. Carroll Par. Hosp. Ser*v. *Dist.*, 134 F.3d 319, 322 (5th Cir. 1998) (collecting cases). The Ninth Circuit's en banc divergence from that consensus—with no explanation—is wrong and presents an important question that warrants this

Court's review. See *Merrill* v. *Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring) (citing *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010), for the proposition that a stay is appropriate if there is a reasonable probability this Court will eventually grant review and a fair prospect of reversal).

As Judge VanDyke explained in the unanimous panel decision below, it is "not the purpose of EMTALA to force hospitals to treat medical conditions using certain procedures," App.C.14, but to defer to "state healthcare standards to determine which course of treatment 'may be necessary' to prevent 'material deterioration,'" App.C.14. Just as EMTALA does not require emergency rooms to provide psychiatric services where they are unavailable, see *Baker*, 260 F.3d at 993–95, it does not require emergency rooms to provide treatments that are unavailable because state law forbids them. And if emergency rooms need not staff up with psychiatrists, they certainly do not have to staff up with abortionists. The federal government cannot use EMTALA to override in the emergency room state laws about abortion any more than it can use it to override state law on organ transplants or marijuana use.

The United States' post-*Dobbs* reinterpretation of EMTALA to require abortion whenever a "relevant professional determines such care is necessary" proves too much. While physicians are supposed to be regulated by state standards of medical practice, this rule would allow their professional judgment to supersede those standards in the emergency room, making doctors a law unto themselves. See App.C.9. EMTALA gives patients the right "to be treated as other similarly situated patients are treated, within the hospital's capabilities." *Summers*, 91 F.3d at 1138.

But it does not give patients a federal right to receive in the emergency room what state law prohibits everywhere else.

EMTALA requires care for "the unborn child." EMTALA cannot require abortions *sub silentio* when it demands care for "the unborn child" in its plain text. In 1989, Congress added the phrase "unborn child" to EMTALA, defining "emergency medical condition" to include a condition that jeopardizes the health of either "the woman or her unborn child." 42 U.S.C. § 1395dd(e)(1)(A)(i); see Pub. L. No. 101-239, § 6211(h), 103 Stat. 2106, 2248 (Dec. 19, 1989). On top of requiring stabilizing an unborn child who presents with an emergency medical condition, 42 U.S.C. § 1395dd(e)(3)(A), EMTALA also requires that transfers (1) minimize risks to the unborn child, *id.* § 1395dd(c)(2)(A); (2) do not threaten the health or safety of the unborn child, *id.* § 1395dd(e)(1)(B)(ii); and (3) assess the medical benefits to the unborn child, *id.* § 1395dd(c)(1)(A)(ii). And if the point were not clear enough, as the United States has acknowledged in Texas's Fifth Circuit litigation, the *only* specific treatment EMTALA requires is to *deliver* an unborn child of a woman who presents in labor. U.S.Br. at 39, *Texas v. Becerra*, No. 23-10246 (5th Cir. May 1, 2023) (citing 42 U.S.C. § 1395dd(e)(3)(A)). Under the *expressio unius* canon, EMTALA's mandate for just this one stabilizing treatment shows that it does not mandate others—and especially not the opposite of the one treatment it does require. EMTALA's regard for the unborn child's life and health precludes interpreting it as a mandate to kill that child.

The United States' position would also cause EMTALA to require Medicaid to fund abortions barred by the Hyde Amendment. "Under the Hyde Amendment … federal funds (including Medicaid funds) may not be used to pay for abortions except in cases of danger to the life of the mother, rape, or incest." *Planned Parenthood Ariz. Inc.* v. *Betlach*, 727 F.3d 960, 964 (9th Cir. 2013). If EMTALA requires abortions beyond what Idaho law permits, then it would violate the Hyde Amendment—another reason the United States' position cannot be correct. Indeed, if the United States' position were correct—that EMTALA *requires* abortions to stabilize emergency medical conditions that fall short of threatening the life of the pregnant woman—then federal law would simultaneously override state law to *mandate* the performance of certain abortions while *prohibiting* the use of federal funds to pay for them. The text of EMTALA in no way supports attributing to Congress this degree of incoherence.

The United States' opportunistic decision to assert—and sue on—purported statutory powers that it "never previously claimed" is troubling indeed. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2372 (2023). And it has consequences not just for Idaho's sovereignty and its citizens, but for many others far beyond this case. The federal government's post-*Dobbs*, revisionist interpretation of EMTALA not only seeks to immunize emergency room abortionists from complying with state law but also would coerce pro-life emergency room doctors to perform or complete on-demand abortions, including "incomplete medical abortions," as a "necessary" stabilizing treatment. *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are*

Experiencing Pregnancy Loss, CMS (July 11, 2022); see also *Texas*, 623 F. Supp. 3d at 716, 728. In fact, HHS is already threatening hospitals and individual physicians with six-figure fines for noncompliance with an abortion mandate found nowhere in the statute. HHS, *HHS Secretary Xavier Becerra Statement on EMTALA Enforcement* (May 1, 2023).

The State is likely to succeed on its challenge to the United States' unauthorized power grab, which presents an important question for this Court's review. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). So for the sake of Idaho and these many others affected by the United States' newfound authority to regulate abortion, the Court should stay the injunction now.

B. Idaho Law Is No Obstacle To EMTALA's Purpose.

The United States' attempt to show obstacle preemption fails for many of the same reasons. There is no abortion-access purpose hiding in the 37-year-old EMTALA statute. As the unanimous Ninth Circuit stay panel correctly held, Idaho's Defense of Life Act poses no obstacle to EMTALA's purpose of preventing patient-dumping. And EMTALA's explicit requirement to stabilize the unborn child precludes the conclusion that Congress's purpose includes requiring abortions in emergency rooms.

Obstacle preemption occurs only when, "under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (cleaned up). This is measured by "examining the federal statute as a whole and identifying its purpose and intended effects." *Ibid.*

And because "[s]tates are independent sovereigns in our federal system," courts presume that Congress "does not cavalierly" preempt historical police powers. *Medtronic*, 518 U.S. at 485. So under obstacle preemption, the States' historical police powers are preempted only if state law stands as an obstacle to "clear and manifest purpose of Congress"—an approach "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Ibid.*

Nothing in the Defense of Life Act poses an obstacle to the purposes and objectives of EMTALA, which do not concern abortion. Congress did not enact EMTALA to address abortion at all, but "to respond to the specific problem of hospital emergency rooms refusing to treat patients who were uninsured or who could otherwise not pay for treatment." *Baker*, 260 F.3d at 993. And as shown, the statute does not require abortion—to the contrary, it embraces the interests of the "unborn child" with three specific statutory references. 42 U.S.C. § 1395dd(c)(1)(A)(ii), (c)(2)(A), and (e)(1)(B)(ii). This statutory language makes the case for obstacle preemption particularly weak, since Congress is no doubt aware of the operation of state abortion law in this "field of federal interest," yet it "has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Levine*, 555 U.S. at 575 (quoting *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–167 (1989)).

When Congress included unborn children in EMTALA's purview, it necessarily left states free to establish parameters to govern the difficult circumstances where the mother's and child's health are both at risk. "[W]here a state seeks to balance the

health interests of a pregnant woman and her unborn child in emergency care, it carries out—rather than poses an obstacle to—the purposes of Congress." *Texas*, 623 F. Supp. 3d at 728.

The district-court injunction disrupts this consensus in a dramatic way by enjoining a state medical law both in the abstract and prophylactically. Yet Idaho's and other states' laws regulating abortion are a key part of the state prerogative to regulate medical standards and exercise police power. By so targeting a state law, the injunction establishes a nationwide abortion standard of care that conflicts with EMTALA's purpose.

Indeed, as explained above, EMTALA's actual purpose is manifestly at odds with any interpretation requiring hospitals to perform abortions. As the Ninth Circuit stay panel explained, "EMTALA seeks to prevent hospitals from neglecting poor or uninsured patients with the goal of protecting 'the health of the woman' *and* 'her unborn child.'" App.C.14 (citing 42 U.S.C. § 1395dd(e)(1)(A) (emphasis added)). For this reason, Idaho's "limitations on abortion services do not pose an obstacle to EMTALA's purpose because they do not interfere with the provision of emergency medical services to indigent patients." App.C.14. Rather, Congress "apparently viewed state regulation" as "complementing its regulatory function, rather than in any way conflicting with it." *Head* v. *N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 432 (1963). Accordingly, the State is likely to succeed on the merits as to obstacle preemption as well.

III. The Equities Warrant A Stay.

A. Idaho Is Suffering Irreparable Harm; The United States Is Not.

This Court has repeatedly recognized that a State's "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); accord *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). That principle applies with even greater force when a federal court uses an unreasoned order to block a validly enacted state law on a matter of great public debate.

Idaho enacted the Defense of Life Act in anticipation of a decision from this Court that would rightfully restore to the states their authority to regulate abortion. *Dobbs* was that decision, and it returned "to the people and their elected representatives" the power to "regulat[e] or prohibit[ ] abortion." 142 S. Ct. at 2284. Yet the en banc Ninth Circuit's unreasoned order blocks that return of sovereign authority and thwarts Idaho's exercise of democratic self-government on the crucial matter of protecting human life. This causes Idaho irreparable harm.

Conversely, the United States will suffer no irreparable harm if this Court grants a stay. Any harm from waiting to persuade the en banc Ninth Circuit that the Act poses an actual conflict with 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*, 583 U.S. 974 (2017). Otherwise, the

United States would be entitled to a federal-court injunction based on every interpretation of a federal statute that the United States uses to try to impair a valid state law. That cannot be right. It is the harm from interfering with state law that is an irreparable injury, not the operation of a state law the federal government opposes and is seeking to subvert.

B. The Balance Of Equities And Public Interest Support A Stay.

The balancing of the equities and the public interest merge when the United States is a party. *Nken*, 556 U.S. at 435. And those factors weigh decisively in favor of this Court's grant of a stay here.

Every day the en banc Ninth Circuit's unreasoned order stands, Idaho's sovereignty and strong interest in protecting innocent human life are impaired. The order undermines Idaho's public interest in promulgating public policies free from federal interference. *E.g.*, *BST Holdings, L.L.C.* v. *OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("The public interest is … served by maintaining our constitutional structure[.]"); *Sierra Club* v. *Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (public interest served by "respecting the Constitution's assignment of … power"). And the United States' unlawful interpretation of EMTALA harms the public interest beyond Idaho too. While *Dobbs* recognizes that the people of Idaho may protect pregnant women *and* their unborn children, the federal government's new EMTALA interpretation, ratified by the district court, turns hospital emergency rooms into abortion clinics and commandeers pro-life doctors into abortion service in the emergency room. The Court should grant a stay to alleviate those harms now.

Critically, staying the en banc Ninth Circuit's unexplained order poses no threat to the healthcare needed by pregnant women in Idaho. As the Ninth Circuit panel recognized, "Idaho's law expressly contemplates necessary medical care for pregnant women in distress." App.C.17 (citing Idaho Code § 18-622(4)). There is no reasonable prospect, for example, that a woman experiencing preeclampsia or an ectopic pregnancy will be denied life-saving medical care, since Idaho law expressly authorizes an abortion where a physician judges it in good faith to be necessary to save the woman's life. Idaho Code § 18-622(2).

Since EMTALA does not require any particular form of medical treatment—abortion or otherwise—an Idaho hospital complies with EMTALA by providing a pregnant woman with an emergency medical condition the same care it would give to any similarly situated patient, regardless of ability to pay. That may include medical treatments other than abortion to resolve a pregnant woman's emergency medical condition. In sum, the United States has no legitimate interest in compelling Idaho's compliance with an implied federal mandate contrary to EMTALA's text and context.

IV. Alternatively, The Court Should Grant Certiorari Before Judgment.

For all the reasons just explained, this Court should stay the en banc Ninth Circuit's unreasoned order and restore the status quo: the stay pending appeal entered by the unanimous panel below. Alternatively, the Court could construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for expedited briefing and argument this Term on the question of whether EMTALA preempts state laws that protect human life and prohibit abor-

tions, like Idaho's Defense of Life Act. Idaho is prepared to brief this case on a schedule that would allow argument during the Court's April 2024 sitting. See *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022) (deferring application to vacate injunction and granting certiorari before judgment).

Under 28 U.S.C. § 2101(e), a writ of certiorari may be filed at any time before a judgment has been rendered in the court of appeals. And the unique circumstances of this proceeding present the type of "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

First, the en banc Ninth Circuit's order is the latest in an epidemic of unreasoned orders from that court that have prevented the enforcement of validly enacted state laws. *Supra* Section I; Order, *Boland* v. *Bonta*, No. 23-55276 (9th Cir. Mar. 31, 2023) (unreasoned order granting partial stay of preliminary injunction of a gun control statute pending appeal); Order, *Roe* v. *Critchfield*, No. 23-2807 (Oct. 26, 2023) (unreasoned order that prevents Idaho from enforcing its law requiring that school locker rooms and restrooms be assigned based on sex). Federal courts should not enjoin democratically passed legislation without providing a rationale. *Purcell*, 549 U.S. at 5. Yet the Ninth Circuit has now done so three times this year alone.

Second, the United States obtained emergency relief from the en banc Ninth Circuit by arguing that it was imperative that EMTALA be available to force emergency room doctors to perform abortions in Idaho. But Idaho's interest is more urgent yet: stopping the federal government from using EMTALA—a law intended to

protect the indigent in our nation's emergency rooms—as a weapon to take innocent human life in states that prohibit abortion.

Third, time is of the essence. The en banc Ninth Circuit delayed oral argument until the week of January 22, 2024. Assuming the en banc majority ultimately follows its unreasoned order, the decision and delay will deprive this Court of any reasonable opportunity to conduct merits review until the October 2024 Term. Assuming a merits opinion from this Court in spring or early summer 2025, Idaho's law will have been wrongfully enjoined for almost two full years.

Finally, the issue presented is ripe for review. The en banc Ninth Circuit's unreasoned order conflicts with the unanimous interpretation of the circuits—including the Ninth—that EMTALA does not establish a federal standard of care. See *supra* note 1. And it may conflict with the forthcoming decision of the Fifth Circuit.

For all these reasons, certiorari before judgment is warranted.

CONCLUSION

The Court should stay the district court's injunction pending appeal or, in the alternative, grant certiorari before judgment.

Dated: November 20, 2023

Respectfully submitted,

CHARLES J. COOPER
DAVID H. THOMPSON
PETER A. PATTERSON
MEGAN M. WOLD
COOPER & KIRK PLLC
1523 New Hampshire Ave. NW
Washington, DC 20036

JOHN J. BURSCH
ERIN M. HAWLEY
MATTHEW S. BOWMAN
LINCOLN DAVIS WILSON
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001

/s/ Joshua N. Turner
RAÚL R. LABRADOR
ATTORNEY GENERAL
JOSHUA N. TURNER
ACTING SOLICITOR GENERAL
Counsel of Record
JAMES E.M. CRAIG
BRIAN V. CHURCH
OFFICE OF THE IDAHO
ATTORNEY GENERAL
700 W Jefferson St #210
Boise, ID 83720
josh.turner@ag.idaho.gov
(208) 332-3548

JAMES A. CAMPBELL
JULIE MARIE BLAKE
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy.
Lansdowne, VA 20176

Counsel for Applicant State of Idaho

CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001
SupremeCtBriefs@usdoj.gov

Nicholas S. Crown
Appellate Staff, Civil Division
Room 7325
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001
nicholas.s.crown@usdoj.gov

William C. Duncan
1868 N. 800 E.
Lehi, UT 84043
billduncan56@gmail.com

/s/ Joshua N. Turner
JOSHUA N. TURNER
ACTING SOLICITOR GENERAL
Counsel of Record
OFFICE OF THE IDAHO
ATTORNEY GENERAL
700 W Jefferson St #210
Boise, ID 83720
josh.turner@ag.idaho.gov
(208) 332-3548

APPENDIX A

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

---

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

APPENDIX B

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

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. STATE OF IDAHO, *Defendant,* v. MIKE MOYLE, Speaker of the Idaho House of Representatives; CHUCK WINDER, President Pro Tempore of the Idaho Senate; THE SIXTY-SEVENTH IDAHO LEGISLATURE, *Proposed Intervenor-Defendants, Movants-Appellants.*	Nos. 23-35440 23-35450 D.C. No. 1:22-cv-00329-BLW ORDER

Filed September 28, 2023

Before: Bridget S. Bade, Kenneth K. Lee, and Lawrence VanDyke, Circuit Judges.

Order by Judge VanDyke

SUMMARY*

Stay / Abortion / Preemption

The panel granted the Idaho Legislature's motion to stay, pending appeal, the district court's order preliminarily enjoining Idaho Code section 18-622, which makes it a crime for a healthcare provider to perform an abortion unless, among a few other exceptions, "the physician determine[s], 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 federal government argued that section 622 was preempted by the Emergency Medical Treatment and Labor Act (EMTALA), which was enacted to ensure that the poor and uninsured receive emergency medical care at hospitals receiving Medicare reimbursement, and requires emergency room doctors to stabilize patients' emergency medical conditions before transferring them. The district court granted the federal government's motion for a preliminary injunction.

The panel considered the factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009), in considering the Idaho Legislature's request for a stay of the district court's injunction, and held that each of the factors favored issuing a stay.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

First, the Legislature made a strong showing that it would succeed on the merits because EMTALA does not preempt section 622. The panel rejected the federal government's assertion that it is impossible to comply with both EMTALA and section 622. And even if the federal government were right that EMTALA requires abortions in limited circumstances, EMTALA would not require those abortions that are punishable by section 622 because termination of a pregnancy is not punishable under section 622 when a doctor determines that an abortion is necessary to save the life of the mother. Nor do section 622's limitations on abortion services pose an obstacle to the purpose of EMTALA because they do not interfere with the provision of emergency medical services to indigent patients.

Second, Idaho will be irreparably injured absent a stay because the preliminary injunction directly harms Idaho's sovereignty.

Finally, the balance of the equities and the public interest support a stay to ensure Idaho's right to enforce its legitimately enacted laws during the pendency of the State's appeal.

ORDER

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court "heed[ed] the Constitution and return[ed] the issue of abortion to the people's elected representatives." 142 S. Ct. 2228, 2243 (2022). After *Dobbs*, a number of states, including Idaho, have exercised that prerogative to enact abortion restrictions. In response, the federal government has sued Idaho claiming that a federal law unrelated to abortion preempts the will of the people of that state, through their elected representatives, to "protect[] fetal life," as *Dobbs* described it. *Id*. at 2261. Because there is no preemption, the Idaho Legislature is entitled to a stay of the district court's order improperly enjoining its duly enacted statute.

BACKGROUND

In 2020, Idaho passed section 622, which prohibits most abortions in the state. *See* S.B. 1385, 65th Leg., 2d Reg. Sess. (Idaho 2020). The law contained a trigger, meaning that it was only to take effect thirty days after judgment was entered "in any decision of the United States supreme court that restores to the states their authority to prohibit abortion." 2020 Idaho Sess. Laws 827. The law makes it a crime for a healthcare provider to perform an abortion unless, among a few other exceptions, "[t]he physician determine[s], 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(2)(a)(i). Idaho law defines abortion 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," except in a few listed circumstances. Idaho Code § 18-604.

Dobbs triggered section 622, after which the federal government challenged Idaho's law, arguing that it is preempted by the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd (EMTALA). EMTALA was enacted to prevent hospitals that receive Medicare reimbursement from refusing to provide emergency care to the indigent because of their inability to pay. *Id.* As relevant to this case, it requires emergency room doctors to stabilize patients' emergency medical conditions before transferring them. The federal government moved for a preliminary injunction to stop Idaho's law from taking full effect on the trigger date following *Dobbs*. The district court granted the preliminary injunction in August 2022 and denied reconsideration in May 2023. Both the State of Idaho and the Idaho Legislature, which was allowed to intervene for purposes of the preliminary injunction, have appealed the district court's decision. The Legislature has also moved for a stay of the injunction pending appeal. Because Idaho's law is not preempted by EMTALA and the equitable factors favor a stay, we grant the Legislature's motion to stay this case pending appeal.

DISCUSSION

We consider four factors when considering a request for a stay of a district court's injunction: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*

v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Each of the four *Nken* factors favors issuing a stay here. The Legislature has made a strong showing that EMTALA does not preempt section 622. EMTALA does not require abortions, and even if it did in some circumstances, that requirement would not directly conflict with section 622. The federal government will not be injured by the stay of an order preliminarily enjoining enforcement of a state law that does not conflict with its own. Idaho, on the other hand, will be irreparably injured absent a stay because the preliminary injunction directly harms its sovereignty. And the balance of the equities and the public interest also favor judicial action ensuring Idaho's right to enforce its legitimately enacted laws during the pendency of the State's appeal.

I. The Legislature Has Made a Strong Showing That It Is Likely to Succeed on the Merits.

Under *Nken*, a stay applicant must make a "strong showing" that it is likely to succeed on the merits. 556 U.S. at 434. This threshold is met because EMTALA does not preempt section 622.

"When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue … there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) (alterations, internal quotation marks, and citations omitted). EMTALA contains an express provision stating 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. § 1395dd(f) (emphases added); *see also Baker v. Adventist Health, Inc.*, 260 F.3d 987, 993 (9th Cir. 2001) ("The statute expressly contains a non-preemption provision for state remedies." (citing § 1395dd(f))). Because this court looks to "[c]ongressional intent [as] the sole guide in determining whether federal law preempts a state statute," we must look "only to this language and construe [EMTALA's] preemptive effect as narrowly as possible." *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993) (citations omitted).

As this court has recognized, when determining the preemptive effect of EMTALA "[t]he key phrase is 'directly conflicts.'" *Id.* Direct conflicts occur in only two instances. First, when compliance with both is a "physical impossibility." *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)); *see also McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015). And second, when the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chiapuzio*, 9 F.3d at 1393 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In this case, neither type of conflict exists.

A. It Is Not Impossible to Comply with Both EMTALA and Section 622.

EMTALA was enacted to ensure that the poor and uninsured receive emergency medical care at hospitals receiving Medicare reimbursement. *See Arrington v. Wong*, 237 F.3d 1066, 1069 (9th Cir. 2001). It provides certain procedures that hospitals must follow but does not set standards of care or specifically mandate that certain procedures, such as abortion, be offered. But even assuming that EMTALA did require abortions in certain, limited

circumstances, it would not require abortions that are punishable by section 622. So it still would not be impossible to comply with both EMTALA and section 622.

In interpreting a statute, we must "start with the statutory text." *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020). The text of EMTALA shows that it does not require hospitals to perform abortions. Instead, EMTALA requires a hospital to determine whether an emergency medical condition is reasonably expected to place "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." 42 U.S.C. § 1395dd(e)(1)(A) (omissions removed) (emphasis added). So an emergency medical condition includes one that "plac[es] the health of the … unborn child[] in serious jeopardy." *Id.* Where such a condition exists, the hospital must stabilize the condition before transferring the individual to another medical facility unless certain conditions are met. *Id.* § 1395dd(b)(1). "[T]o 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." *Id.* § 1395dd(e)(3)(A).

EMTALA therefore has dual stabilization requirements: hospitals must ensure that "no material deterioration of the condition" of a woman *or* her unborn child is likely to occur. The assumption that EMTALA implies some hierarchy when stabilization of the woman might require "a material deterioration of the condition" of the child requires us to read *in* an *implicit* duty to perform abortions from the explicit duty to stabilize, which is far beyond that required for a *direct* conflict.

The federal government nonetheless argues that because hospitals are required to stabilize patients' medical conditions, they must perform abortions because abortion could be a "form of stabilizing treatment." But EMTALA does not require the State to allow every form of treatment that *could conceivably* stabilize a medical condition solely because, as the government argues, a "relevant professional determines such care is necessary." In fact, EMTALA does not impose *any* standards of care on the practice of medicine. Nor could it within the broader statutory scheme. *See Baker*, 260 F.3d at 993. It certainly doesn't require that a hospital provide whatever treatment an individual medical professional may desire. For example, a medical professional may believe an organ transplant is necessary to stabilize a patient's emergency medical condition, but EMTALA would not then preempt a state's requirements governing organ transplants.

Because Congress's "clear and manifest" purpose confirms that EMTALA does not impose specific methods of "stabilizing treatment," we must assume "that the historic police powers of the States [are] not to be superseded by" EMTALA. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The purpose of EMTALA is "to prevent hospitals [from] dumping indigent patients by either refusing to provide emergency medical treatment or transferring patients before their conditions were stabilized." *Arrington*, 237 F.3d at 1069 (alternations, internal quotation marks, and citation omitted). The purpose of EMTALA is not to impose specific standards of care—such as requiring the provision of abortion—but simply to "ensure that hospitals do not refuse essential emergency care because of a patient's inability to pay." *Eberhardt v. City of Los Angeles*, 62 F.3d

1253, 1258 (9th Cir. 1995). To read EMTALA to require a specific method of treatment, such as abortion, pushes the statute far beyond its original purpose, and therefore is not a ground to disrupt Idaho's historic police powers.

Even if the federal government were correct that EMTALA requires abortions as "stabilizing treatment" in limited circumstances, EMTALA still would not conflict with Idaho's law. Section 622 includes an exception allowing abortion when a "physician determine[s], in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion [is] necessary to prevent the death of the pregnant woman." Idaho Code § 18-622.

The district court concluded that there is a gap between what a doctor might believe necessary to save the life of a pregnant woman and what might be reasonably expected to place the health of her or her unborn child in serious jeopardy, seriously impair their bodily functions, or cause serious dysfunction of any bodily organ or part. Specifically, the district court invoked the supposed ambiguity in Idaho's law to construe it as creating a conflict with EMTALA. But almost all the examples in the district court's parade-of-horribles are no longer true, given the Idaho Legislature's recent amendment to the statute and clarification from the Supreme Court of Idaho.

First, relying on declarations from certain doctors, the district court repeatedly noted that the Idaho law's ambiguity would interfere with doctors' medical judgment. For example, it held that "against the backdrop of these uncertain, medically complex situations, [the statutory exception] is an empty promise—it does not provide any clarity." It added that it "offers little solace to physicians

attempting to navigate their way around both EMTALA and Idaho's criminal abortion laws" and that "Idaho law criminalizes as an 'abortion' what physicians in emergency medicine have long understood" as required to save lives.

But after the district court issued its injunction, the Supreme Court of Idaho authoritatively interpreted this state law provision as providing a broad, subjective standard requiring the doctor, in his or her good faith medical judgment, to believe it necessary to terminate the pregnancy. *Planned Parenthood Great Nw. v. Idaho*, 522 P.3d 1132, 1203 (Idaho 2023). Put another way, the Supreme Court of Idaho clarified that the text of the exception means what it says: if a doctor subjectively believes, in his or her good faith medical judgment, that an abortion is necessary to prevent the death of the pregnant woman, then the exception applies. *Id*. Thus, the district court's reliance on declarations from certain doctors claiming that the law would undermine their medical judgment is no longer valid.

Second, the district court also relied on some of the federal government's experts who argued that Idaho doctors could not terminate a pregnancy while complying with section 622 because they could not be *certain* that an abortion is necessary. But the Supreme Court of Idaho has made clear that "certainty" is not the standard under Idaho law. That Court also held that the standard has no imminency requirement. *Id.* at 1203–04. It explicitly held that the "necessary to save the life of the mother" standard does not require certainty, a substantial risk of death, or any other particular probability level. *Id.* Nor is a "medical consensus on what is necessary to prevent the death of the woman … required …." *Id.* at 1204 (internal quotation marks omitted). As the Supreme Court of Idaho put it, "[t]he plain language of the [exception] 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." *Id.* at 1203.

Third, the district court heavily relied on ectopic pregnancies—mentioning them eleven times in the opinion—as a justification for finding section 622 in direct conflict with EMTALA. But Idaho recently amended its law to clarify that "the removal of an ectopic or molar pregnancy" is *not* an abortion. *See* 2023 Idaho Sess. Laws 906 (excluding from the statute's definition of "abortion"). So that issue is now moot.

Fourth, the district court emphasized that the life of the mother exception in the statute was technically an affirmative defense, noting that an "affirmative defense is an excuse, not an exception" and that this "difference is not academic." But Idaho amended the law to make it a statutory exception, not an affirmative defense. 2023 Idaho Sess. Laws 908. So this objection, too, has been superseded by events.

Given the statutory amendments and the Supreme Court of Idaho's recent decision, any ambiguity identified by the federal government and the district court no longer exists: if a doctor believes, in his or her good faith medical judgment, that an abortion is necessary to save the life of the mother, then the exception applies. Neither the probability nor the imminency of death matters to the exception's application. *Id.* at 1203. For all the hypotheticals presented by the district court, the conduct required by EMTALA has been shown to satisfy section 622's "life of the mother" standard, so the two laws would not conflict even if EMTALA actually required abortions.

In sum, when a doctor determines an abortion is necessary to save the life of the mother, termination of a pregnancy is not punishable by section 622. Idaho Code § 18-622. Therefore, even if the federal government were right that EMTALA requires abortions in certain limited circumstances, EMTALA would not require abortions *that are punishable by section 622*. The federal government is thus wrong when it asserts that it is impossible to comply with both EMTALA and section 622.

B. Section 622 Does Not Pose an Obstacle to the Purpose of EMTALA.

Obstacle preemption occurs when, "under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (alterations and internal quotation marks omitted) (quoting *Hines*, 312 U.S. at 67). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute *as a whole* and identifying its purpose and intended effects …." *Id.* (emphasis added).

As relevant here, "Congress enacted EMTALA to respond to the specific problem of hospital emergency rooms refusing to treat patients who were uninsured or who could otherwise not pay for treatment." *Baker*, 260 F.3d at 993. EMTALA was "not intended to create a national standard of care for hospitals or to provide a federal cause of action akin to a state law claim for medical malpractice." *Id.*; *see also Eberhardt*, 62 F.3d at 1258 ("The statutory language of the EMTALA clearly declines to impose on hospitals a national standard of care in screening patients."). This conclusion is "[c]onsistent with the statutory language" of EMTALA, *id.*,

under which the duty to stabilize is "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). Under the language of EMTALA, Congress left it to state healthcare standards to determine which course of treatment "may be necessary" to prevent "material deterioration …." *See id.*

It is not the purpose of EMTALA to force hospitals to treat medical conditions using certain procedures. Instead, EMTALA seeks to prevent hospitals from neglecting poor or uninsured patients with the goal of protecting "the health of the woman" and "her unborn child." 42 U.S.C. § 1395dd(e)(1)(A). Section 622's limitations on abortion services do not pose an obstacle to EMTALA's purpose because they do not interfere with the provision of emergency medical services to indigent patients.

II. The Legislature Has Shown Irreparable Harm Absent a Stay.

"[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." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (alterations in original) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)). The district court's injunction prevents Idaho from enforcing section 622 as enacted by representatives of its people, so the State easily meets its burden of showing irreparable harm. The federal government's two arguments to the contrary do not convince us otherwise.

First, the government argues that the Legislature cannot establish irreparable harm by pointing to harm to the State of Idaho itself. But it makes no difference to our harm analysis that the State seeks the stay through its Legislature, rather than through its Attorney General; the government's argument to the contrary relies upon a distinction without a difference. The State itself, not merely its officials, "suffers a form of irreparable injury" when it cannot effectuate its statutes. *Id.* And the State "is free to 'empower multiple officials to defend its sovereign interests in federal court.'" *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2202 (2022) (alteration omitted) (quoting *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022)). Here, Idaho law empowers the Legislature as a state entity to represent those interests. *See* Idaho Code § 67-465. The Legislature may thus invoke the State of Idaho's irreparable harm.

Second, the federal government claims that the Legislature's delay in requesting the stay is "substantial and inexplainable," and therefore prevents a showing of irreparable harm. The record is somewhat mixed on this issue, but usually "delay is but a single factor to consider in evaluating irreparable injury." *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014). While "failure to seek judicial protection can imply the lack of need for speedy action," here there is no evidence that the Legislature was "sleeping on its rights." *Id*. at 990–91 (internal quotation marks and citation omitted).

It appears that the extended period of time after the district court's original injunction here is instead explained primarily by the long time that court took in ruling on Idaho's reconsideration motions, together with other circumstances outside the Legislature's control. On

September 7, 2022, only two weeks after the district court granted the federal government's injunction, the Legislature moved for reconsideration. And in November 2022, it sent a letter to the court requesting a ruling on the motion to reconsider. In January 2023, three months after the federal government responded to the reconsideration motion and two months after the Legislature requested an expedited ruling, the Supreme Court of Idaho issued a decision authoritatively interpreting section 622. Idaho requested leave to file supplemental briefing in federal court addressing the Supreme Court of Idaho's decision. The district court took another three months after the supplemental briefing was complete to decide the motion for reconsideration; the Legislature was not at fault for these delays. And the Legislature moved for a stay in the district court on the same day it timely noticed its appeal of the district court's denial of its motion for reconsideration. We cannot say that the Legislature was clearly dilatory in defending the State's rights. The record suggests that the Legislature tried to protect those rights before the district court before seeking a stay from this court.

III. The Balance of the Equities Favors a Stay.

The third and fourth *Nken* factors—"whether issuance of the stay will substantially injure the other parties interested in the proceeding" and "where the public interest lies"—also favor a stay. 556 U.S. at 435.

Idaho enacted section 622 to effectuate that state's strong interest in protecting unborn life. That public interest is undermined each day section 622 remains inappropriately enjoined. Beyond that specific interest, improperly preventing Idaho from enforcing its duly enacted laws and general police power also undermines the State's public

interest in self-governance free from unwarranted federal interference. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("The public interest is also served by maintaining our constitutional structure[.]"); *Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (public interest is served by "respecting the Constitution's assignment of … power").

The federal government points to no injury to itself caused by Idaho's law. Instead, relying on its merits argument that Idaho's law is preempted, it cites to cases holding that "preventing a violation of the Supremacy Clause serves the public interest." But because Idaho's law is not preempted, those arguments do not help the federal government.

Beyond that inapposite concern, the federal government argues that a continued stay will result in public health benefits for pregnant women needing emergency care, and also benefit hospitals in neighboring states who would otherwise be forced to treat women denied such care in Idaho. But Idaho's law expressly contemplates necessary medical care for pregnant women in distress. *See* Idaho Code § 18-622(4). So the federal government's argument that pregnant women will be denied necessary emergency care overlooks Idaho law. And as explained above, even assuming abortions were required to "stabilize" emergency conditions presented by some pregnant women, and that EMTALA required such treatment, Idaho's law would not prevent abortions in those circumstances.

Ultimately, given our conclusion that EMTALA does not preempt Idaho's law, the federal government has no discernable interest in regulating the internal medical affairs of the State, and the public interest is best served by

preserving the force and effect of a duly enacted Idaho law during the pendency of this appeal. Therefore, the balance of the equities and the public interest support a stay in this case.

CONCLUSION

For the above reasons, the traditional stay factors favor granting the Legislature's motion. The Legislature's motion for a stay pending appeal is therefore **GRANTED**.

APPENDIX D

FOR PUBLICATION

FILED

OCT 10 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STATE OF IDAHO, Defendant, v. MIKE MOYLE, Speaker of the Idaho House of Representatives; CHUCK WINDER, President Pro Tempore of the Idaho Senate; THE SIXTY-SEVENTH IDAHO LEGISLATURE, Proposed Intevenor-Defendants, Movants-Appellants.	Nos. 23-35440, 23-35450 D.C. No. 1:22-cv-00329-BLW District of Idaho, Boise **ORDER**

MURGUIA, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this matter be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The order published at 2023 WL 6308107 (9th Cir. Sep. 28, 2023) is vacated.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 13 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF IDAHO,

Defendant,

v.

MIKE MOYLE, Speaker of the Idaho House of Representatives; CHUCK WINDER, President Pro Tempore of the Idaho Senate; THE SIXTY-SEVENTH IDAHO LEGISLATURE, Proposed Intervenor-Defendants,

Movants-Appellants.

Nos. 23-35440, 23-35450

D.C. No. 1:22-cv-00329-BLW
District of Idaho,
Boise

ORDER

Before: MURGUIA, Chief Judge, and GOULD, CALLAHAN, M. SMITH, OWENS, MILLER, BRESS, FORREST, VANDYKE, KOH and MENDOZA, Circuit Judges.

The Idaho Legislature's motion to stay the district court's injunction pending appeal (Dkt. 31) is denied. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). The district court's injunction therefore remains in effect. Further, we deny the Idaho Legislature's Emergency Motion Under Circuit Rule 27-3 (Dkt. 71) as moot.

The en banc court will proceed to consider the merits of this preliminary injunction appeal. Absent further order of the Court, no additional briefing is required.

En banc oral argument will take place during the week of January 22, 2024, in Pasadena, California. The date and time will be determined by separate order. For further information or special requests regarding scheduling, please contact Deputy Clerk Paul Keller at paul_keller@ca9.uscourts.gov or (206) 224-2236.

Within seven days from the date of this order, the parties shall forward to the Clerk of Court eighteen additional paper copies of the original briefs and ten additional paper copies of the excerpts of record. The paper copies must be accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. The Form 18 certificate is available on the Court's website at http://www.ca9.uscourts.gov/forms/.

Judges Callahan, Miller, Bress, and VanDyke respectfully dissent from the order denying Idaho's motion to stay the district court's injunction pending appeal and would have granted the stay for substantially the reasons set forth in the original three-judge motions panel order. *See United States v. Idaho*, 83 F.4th 1130 (9th Cir. 2023).