No. 23-____

In the Supreme Court of the United States

MIKE MOYLE, Speaker of the Idaho House of Representatives of the State of Idaho, et al.,
Applicants,

v.

UNITED STATES OF AMERICA,
Respondent.

APPLICATION FOR STAY OF THE PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

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PARTIES TO THE PROCEEDING

Applicants are Mike Moyle, Speaker of the Idaho House of Representatives; and Chuck Winder, President Pro Tempore of the Idaho State Senate; and the Sixty-Seventh Idaho Legislature. They are Intervenors-Appellants in the consolidated appeal before the Ninth Circuit.

Respondent is the United States of America, which is Plaintiff-Appellee in the Ninth Circuit.

The State of Idaho is a Defendant-Appellant in the consolidated appeal before the Ninth Circuit but is not involved in the proceedings to obtain a stay.

RELATED PROCEEDINGS

United States District Court (Idaho):

United States of America v. The State of Idaho, No. 1:22-cv-00329-BLW (Aug. 24, 2022) (preliminary injunction)

United States of America v. The State of Idaho, No. 1:22-cv-00329-BLW (May 4, 2023) (preliminary injunction)

United States of America v. The State of Idaho, No. 1:22-cv-00329-BLW (Aug. 13, 2022) (intervention)

United States of America v. The State of Idaho, No. 1:22-cv-00329-BLW (February 3, 2023) (intervention)

United States Court of Appeals (9th Cir.):

United States of America v. The State of Idaho, No. 23-35440; *United States of America v. The State of Idaho v. Mike Moyle,* et al, No. 23-35450 (preliminary injunction, consolidated)

United States of America v. The State of Idaho, No. 23-35153 (9th Cir.) (intervention)

United States of America v. The State of Idaho, No. 23-35440; *United States of America v. The State of Idaho v. Mike Moyle,* et al, No. 23-35450 (Sept. 28, 2023) (motion for stay)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, applicants consist of the Idaho Legislature and its elected leaders. As such, none of the applicants is a corporation with a parent corporation and none issues stock.

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**TO THE HONORABLE JUSTICE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT AND
CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:**

INTRODUCTION

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651, the Idaho Legislature respectfully applies for a stay of the preliminary injunction issued on August 24, 2022, by the United States District Court for the District of Idaho, pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought.

This application concerns a preliminary injunction with extraordinary consequences.

The District Court has enjoined the enforcement of Idaho Code § 18-622 (section 622), which prohibits abortions unless authorized, on the sole ground that the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, preempts it. By accepting that reading of EMTALA, the District Court announced a federal abortion mandate that the statutory text does not support and stretched EMTALA's preemptive reach beyond the boundaries set by overlapping express preemption provisions. *See id.* §§ 1395dd(f), 1395.

Construing EMTALA as a federal abortion mandate raises grave questions under the major questions doctrine that affect both Congress and this Court. EMTALA's spare directive to provide "stabilizing treatment" for a patient with an emergency medical condition does not convey clear congressional authorization to

regulate abortion in all 50 States. *Id.* § 1395dd(b) (heading). If that weren't enough, the statutory construction advanced by the United States challenges the Court's authority by illicitly undermining *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Concentrating power in the Executive Branch distorts the federal system as well. *Dobbs* held that States may regulate abortion, *id.* at 2279, but the preliminary injunction reimposes federal control. That result prevents the State of Idaho and its people from charting their own course regarding abortion, based on a federal mandate that Congress never adopted. Letting the decision below stand would be a sad day for our country. Americans understandably disagree when a woman should be free to end her pregnancy, but we should agree that the United States is a government of laws.

A stay from this Court would allow the Idaho Legislature to defend its law without continuing to suffer irreparable injury. This application for stay satisfies the controlling standard under *Nken v. Holder*, 556 U.S. 418, 434 (2009).

1. The Legislature suffers an ongoing irreparable injury from the preliminary injunction issued by the District Court. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *accord Abbott v. Perez*, 138 S. Ct. 2305, 2323–24 and n.17 (2018). Judicial interference with the ordinary operation of state law is an independent injury. Here, that injury is heightened by the intense controversy surrounding a federal injunction halting Idaho's primary abortion law.

2. The Legislature has a strong likelihood of success.

First, EMTALA is bound by overlapping express preemption clauses that the District Court misapplied and overlooked. EMTALA denies preemption unless a state law "directly conflicts." 42 U.S.C. § 1395dd(f). The government's implied duty of abortion access does not conflict with a state law "directly." *Id.* A separate clause governing EMTALA prohibits a federal "officer or employee" from construing the statute to exercise "supervision or control" over the "practice of medicine." *Id.* § 1395. Yet federal control is exactly what the District Court's reading of EMTALA achieves.

Second, the lower court's statutory construction rests on an insupportable inference. The court accepted the government's claim that EMTALA's requirement of delivering "stabilizing treatment" to a patient with an emergency medical condition includes a duty to perform an abortion as solely dictated by the physician's medical judgment. *Id.* § 1395dd(b). But EMTALA says nothing about abortion. Construing the spare phrase "stabilizing treatment" as a blank slate to be filled with the Executive Branch's preferred abortion policy collides with multiple statutory provisions guaranteeing emergency medical care for a pregnant woman and her unborn child. *See id.* §§ 1395dd(e)(1)(A)(i); 1395dd(e)(1)(B)(ii); 1395dd(c)(1)(A)(ii); and 1395dd(c)(2)(A). EMTALA does not address the hard questions that arise when a pregnant woman has an emergency medical condition for which some physicians would perform an abortion. Silence may confer consent in other settings but not when examining a statute for congressional authority. Construing EMTALA as the District Court did is deeply mistaken because it departs from settled rules of statutory construction and breaches the major questions doctrine.

Third, preempting Idaho law based on a doubtful reading of EMTALA raises serious constitutional questions. Idaho's independent sovereignty guaranteed by the Tenth Amendment is denied if the government's contrived federal mandate succeeds in overriding the State's duly enacted law. The preliminary injunction thwarts the State's sovereign authority to regulate abortion despite *Dobbs*, 142 S. Ct. at 2228. The Spending Clause is likewise violated by the United States' threat to strip Idaho of Medicare funding to leverage the State's compliance with a mandate that EMTALA does not contain.

3. Other *Nken* factors also favor a stay. The balance of equities tips toward the Legislature since its ongoing irreparable harm from the preliminary injunction outweighs any harm to the United States from a doubtful preemption claim. The public interest lies in preserving the integrity of federal law and the Constitution's structural guarantees. While the District Court focused on the harm of regulating abortion for pregnant women with emergency complications, the issue is not whether women in medical crisis deserve decent medical care. They emphatically do. Instead, the pressing question is, who decides when abortion is lawful? Under *Dobbs*, the answer is clear: "the authority to regulate abortion [is] returned to the people and their elected representatives"—not granted to unelected federal officials acting at the President's behest. *Id.* at 2279.

For these reasons, the applicants meet the traditional criteria for a stay.

STATEMENT

A. Statutory Background

1. EMTALA

EMTALA obligates Medicare-funded hospitals to provide medical treatment for emergency medical conditions, regardless of a patient's ability to pay. *See* 42 U.S.C. § 1395dd. EMTALA obligates a Medicare-participating hospital to (1) perform "an appropriate medical screening examination" to see whether the patient has an emergency medical condition, *id.* § 1395dd(a); (2) conduct a further medical exam along with "such treatment as may be required to stabilize the medical condition" or send the patient "to another medical facility," *id.* § 1395dd(b)(1); and (3) transfer a patient with an emergency medical condition that has not been stabilized only as provided and where "appropriate," *id.* § 1395dd(c)(1).

Noncompliance can carry severe consequences. A hospital or physician "that negligently violates" EMTALA "is subject to a civil money penalty of" up to $50,000 per violation. 42 U.S.C. § 1395dd(d)(1)(A), (B). A provider or facility whose violations are "gross and flagrant or [are] repeated" may be excluded "from participation in [Medicare] and State health care programs." *Id.* § 1395dd(d)(1)(B).

2. Idaho Abortion Law

The Idaho statute challenged here is Idaho Code § 18-622 (section 622).[1] Entitled "Defense of Life Act," section 622 makes it a crime for anyone to perform an

[1] All citations to section 622 refer to the amended version currently in effect, unless otherwise indicated.

abortion unless a physician acts within exceptions that the statute enumerates. *See id*. § 622(1). That proscription restores long-held Idaho policy. *See Planned Parenthood Great Nw. v. State*, 532 P.3d 801, 807 (Idaho Aug. 12, 2022) (describing how Idaho law treated abortion as a crime, with exceptions, from territorial days until *Roe v. Wade*, 410 U.S. 113 (1973)). It also reflects pre-*Roe* consensus. *See Dobbs*, 142 S. Ct. at 2253–54 ("[A]n unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.").

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." IDAHO CODE § 18-604(1). Section 622 prohibits a physician from performing an abortion, with enumerated exceptions. *Id.* § 622(1). A physician may perform an abortion when "necessary to prevent the death of the pregnant woman," based on "good faith medical judgment and based on the facts known to the physician at the time." *Id.* § 622(2)(a). Another exception permits an abortion (during the first trimester) to terminate a pregnancy resulting from rape or incest. *Id.* § 622(2)(b). No liability attaches when a doctor causes "the accidental death of, or unintentional injury to, the unborn child" while treating a pregnant woman. *Id.* § 622(4). No woman is liable under section 622 for having an abortion. *Id.* § 622(5).

A trigger provision in the original version of section 622 provided that the law would become effective 30 days after a decision by this Court "that restores to the states their authority to prohibit abortion." *Id.* § 622(1)(a) (repealed). *Dobbs*, 142 S.

Ct. at 2284, was that decision. The *Dobbs* judgment issued on July 26, 2022, making section 622 presumptively effective on August 25. *See* Docket Statement, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html.

Section 622 was amended during the 2023 legislative session. *See* H.B. 374, 67th Leg., 1st Sess. (Idaho 2023) (eff. July 1, 2023). Among those amendments were provisions replacing affirmative defenses with exceptions. *See* IDAHO CODE § 18-622(2).

B. Procedural History

1. The Complaint

On August 2, 2022, the United States filed suit against the State of Idaho[2] claiming that section 622 violates the Supremacy Clause. Compl., *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Aug. 2, 2022), ECF No. 1 ("Complaint"). The government's theory is that EMTALA requires Medicare-participating hospitals to provide an abortion as "stabilizing care" when a pregnant woman suffers an "emergency medical condition" supposedly demanding it. *Id.* at 2. This theory reflects a guidance document issued by an HHS component, CMS Center for Clinical Standards and Quality, QSO-22-22-Hospitals at 1 ("Reinforcement of EMTALA

[2] Days after the complaint, applicants sought to intervene as of right, citing their authority under Idaho Code § 67-465 and this Court's decision in *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022). The District Court denied intervention as of right but granted permissive intervention. Mem. Decision and Order, *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Aug. 13, 2022), ECF No. 27. A later order denied the Legislature's renewed motion to intervene, *id.* at ECF No. 125 (Feb. 6, 2023), and that order is on appeal in the Ninth Circuit No. 23-35153.

Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss") (July 11, 2022), which followed shortly after a presidential directive instructing federal agencies to "protect and expand access to abortion." Exec. Order No. 14,076, 87 Fed. Reg. 42053 (Jul. 8, 2022). On this understanding, preemption occurs because "medical care that a state may characterize as an 'abortion' is necessary emergency stabilizing care that hospitals are required to provide under EMTALA." Complaint at 2. The complaint seeks a declaratory judgment, as well as preliminary and permanent injunctive relief. *Id.* at 16.

2. Opinion Below

The United States moved for a preliminary injunction, which the District Court granted the day before section 622 was due to become effective. App. 38a. The Court ruled that the United States would "likely succeed on the merits" because "state law must yield to federal law when it's impossible to comply with both," and section 622 "conflicts with" EMTALA. App. 41a. Central to that analysis was EMTALA's clause authorizing preemption when a state law "directly conflicts." 42 U.S.C. § 1395dd(f). Construing that phrase in terms of impossibility and obstacle preemption, *see* App. 57a (citing *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993)), the Court concluded that EMTALA preempts section 622.

Impossibility preemption applies, the Court said, because "EMTALA obligates the treating physician to provide stabilizing treatment, including abortion care" and "Idaho statutory law makes that treatment a crime." *Id.* Provisions offering an affirmative "defense to prosecution" for a physician who performs an abortion as

authorized by statute, IDAHO CODE § 18-622(3) (repealed), "cure the impossibility." App. 58a. The Court pointed to "an ectopic pregnancy" as a "straightforward example" of a medical condition requiring treatment that section 622 supposedly disallows. App. 45a. Other pregnancy complications mentioned by the Court were preeclampsia, the possibility of sepsis, a blood clot, or a placental abruption. *See* App. 46a. The Court accepted the government's position that since section 622 does not allow an abortion for these conditions, a physician cannot "comply with both statutes." App. 57a.

Obstacle preemption applied because, according to the District Court, section 622 obstructs EMTALA's aims of "establish[ing] a bare minimum of emergency care that would be available to all people in Medicare-funded hospitals." App. 63a. State law impedes that goal by "deter[ring] physicians from providing abortions in some emergency situations." App. 64a. Section 622 "compounds the deterrent effect," the Court wrote, by offering "an affirmative defense rather than an exception." *Id.*

On this logic, the District Court concluded that EMTALA preempts section 622. App. 76a. The Court denied that *Dobbs* had any relevance. "*Dobbs* did not overrule the Supremacy Clause. Thus, even when it comes to regulating abortion, state law must yield to federal law." *Id*. Therefore, the Court issued an order that "restrains and enjoins the State of Idaho, including all of its officers, employees, and agents, from enforcing Idaho Code § 18-622(2)-(3) as applied to medical care required by [EMTALA]." *Id.*

3. Motions to Reconsider

Fourteen days later, the Legislature filed a motion for reconsideration. Mot. for Recons., *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Sept. 7, 2022), ECF No. 95. It explained that the District Court's order overlooked a contradiction between the government's preemption claim and EMTALA's text. *Id.* EMTALA obligates a physician to protect "the health of the woman *or her unborn child*." *Id.* at 2 (quoting 42 U.S.C. § 1395dd(e)(1)(A) (emphasis added)). Given that language, it is unreasonable to read EMTALA as an abortion mandate. *Id.* at 3–4. The Legislature also identified precedents rejecting "the government's attempt to use EMTALA as a wedge to leverage federal control over state abortion laws." *Id.* at 5. And the Legislature added that imposing a flawed theory of preemption raises serious issues under the major questions doctrine, the Supremacy Clause, Article III, the Spending Clause, and the Tenth Amendment. *See id.* at 9–16.

The Legislature sought reconsideration rather than filing an appeal and seeking a stay, out of a belief that motions practice would continue to move swiftly, as it had done under an expedited briefing schedule requested by the United States. *See* Docket Entry Order, *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Aug. 8, 2022), ECF No. 17. There was no reason to anticipate that the District Court would take eight months to decide the motion.

With the preliminary injunction in place, the District Court throttled down from its breakneck pace and returned to regular order. When several weeks passed after the close of briefing without a decision, the Legislature submitted a written

request for a ruling. *See id.* at ECF No. 115 (Nov. 17, 2022). The District Court did not respond.

In January 2023, the Idaho Supreme Court affirmed the validity of section 622 against challenges under Idaho law. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (Idaho 2023). The Legislature and the State requested a stay to file supplemental briefs addressing the implications of the Idaho decision for the validity of the preliminary injunction. Docket Entry Order, *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Jan. 24, 2023), ECF No. 122. That stay elapsed on February 21, 2022. *Id.*

4. Reconsideration Order

On May 4, 2023, the District Court denied reconsideration. App. 25a. Despite the Idaho decision, the Court found "no reason to reconsider its decision … and the injunction stands." App. 36a. Even though the Idaho Supreme Court sustained section 622 under the Idaho Constitution, *Planned Parenthood*, 522 P.3d 1132, the District Court ruled that the decision "confirms each of the fundamental principles that underpinned this Court's decision." App. 32a. The District Court ruled that the Idaho decision did not "fundamentally alter" EMTALA's preemptive effect, *id.*, even though the Idaho court clarified that section 622 does not cover ectopic or nonviable pregnancies and that the statute's exceptions turn on a physician's subjective judgment. The District Court did not acknowledge amendments replacing section 622's affirmative defenses with exceptions or address the Legislature's constitutional objections to the preliminary injunction. App. 25a–36a.

5. Appeal and Motions to Stay

The Legislature filed a timely notice of appeal with the Ninth Circuit on July 3, 2023. Notice of Appeal, *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Jul. 3, 2023), ECF No. 138.[3] That same day, the Legislature moved for a stay pending appeal with the District Court. *Id.* at ECF No. 140 (Jul. 3, 2023). Weeks passed without a response, so the Legislature sought a stay from the Ninth Circuit. Mot. to Stay, *United States v. Idaho*, No. 23-35450 (9th Cir. Aug. 22, 2023), ECF No. 29. A unanimous three-judge panel granted a stay. App 6a.[4] The panel's 18-page opinion explained why the Legislature's motion satisfies the controlling standard:

> Each of the four *Nken* [*v. Holder*, 556 U.S. 418 (2009)] 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.

App. 12a.

Within two days of this decision, the United States sought reconsideration *en banc*, Mot. for Recons., *United States v. Idaho*, No. 23-35450 (9th Cir. Sept. 30, 2023),

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[3] ECF citations concerning the pending appeal in the Ninth Circuit refer to the docket in case No. 23-35450 rather than No. 23-35440, the State's appeal.

[4] The original order was issued at *United States v. Idaho*, No. 23-35450 (9th Cir. Sept. 28, 2023), ECF No. 47. A reformatted version was released a few days later. ECF No. 57 (Oct. 10, 2023). The reformatted version is included in the Appendix at App. 6a and all references are thereto.

ECF No. 51, which the Ninth Circuit granted on October 10. *Id.* at ECF No. 67 (Oct. 10, 2023). That order also vacated the panel decision: Vacatur reinvigorated the preliminary injunction, freshly exposing the State to irreparable injury. *Id.*

On November 1, the Legislature filed an emergency motion requesting an expedited decision on the stay by November 15. *Id.* at ECF No. 69 (Nov. 1, 2023). The Ninth Circuit responded on November 13 with a two-page order denying a stay. App. 1a. Other than the reference to *Nken*, the order contains no citation or analysis explaining the court's reasoning. The same order denied the Legislature's emergency motion as moot. *See id.* (In fairness, the order reflected an expedited decision as requested.) The order then explained that "[t]he en banc court will proceed to consider the merits of this preliminary injunction appeal." *Id.* at 2. *En banc* panel members consisted of Chief Judge Murguia and Judges Gould, Callahan, M. Smith, Owens, Miller, Bress, Forrest, VanDyke, Koh, and Mendoza. Of these, Judges Callahan, Miller, Bress and VanDyke dissented. They "would have granted the stay for substantially the same reasons set forth in the original three-judge motions panel order." *Id.* (citation omitted).

This application follows. Having sought a stay pending appeal from the District Court and the Ninth Circuit, the Idaho Legislature has shown "with particularity" why only this Court can grant relief. Sup. Ct. R. 23.3. Without a stay, the Legislature faces irreparable injury from an erroneous federal injunction, and that injury that will persist until the Ninth Circuit elects to issue a final judgment.

ARGUMENT

The Idaho Legislature is entitled to a stay pending appeal because (1) the Legislature is likely to succeed on the merits; (2) the Legislature will be irreparably injured absent a stay; (3) a balance of the equities favors a stay; and (4) a stay serves the public interest. *Nken*, 556 U.S. at 434. Factors one and two "are the most critical." *Id.* Factors three and four "merge" because the United States is the opposing party. *Id.* at 435.

I. THE IDAHO LEGISLATURE WILL BE IRREPARABLY INJURED WITHOUT A STAY.

The Idaho Legislature has established that it "suffer[s] irreparable harm" without a stay. *Id.* at 434. A State suffers "ongoing irreparable harm" whenever it is "enjoined by a court from effectuating statutes enacted by representatives of its people." *King*, 567 U.S. at 1303 (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) (same); *Abbott*, 138 S. Ct. at 2324 n.17 ("[The inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."). Interference with the operation of state law *is* the injury.

The Idaho Legislature enacted section 622 in anticipation of a decision by this Court abandoning *Roe*. *Dobbs*, 142 S. Ct. 2228, is that decision. It held that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion," and, accordingly, "return[ed] that authority to the people and their elected representatives." *Id.* at 2284. The preliminary injunction blocks Idaho's exercise of democratic self-government.

Maintaining the preliminary injunction against section 622 is anything but harmless even if the injunction issued last year. Federal injunctions are the exception, not the norm. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."). Every day that passes with an injunction in place inflicts irreparable harm on the Legislature.

II. THE IDAHO LEGISLATURE HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

A. EMTALA Cannot Preempt Section 622.

On the merits, the Legislature has put forward a powerful case. The preliminary injunction stands on the sole ground of preemption—that, in the District Court's opinion, "there will always be a conflict between EMTALA and Idaho Code § 18-622" because "EMTALA obligates the treating physician to provide stabilizing treatment, including abortion care." App 57a. But EMTALA is governed by two non-preemption clauses that should have steered the District Court away from a preliminary injunction. Since EMTALA does not preempt section 622, the decision below is incorrect.

1. Settled principles shape the issue of preemption.

EMTALA is governed by two express preemption clauses, 42 U.S.C. §§ 1395dd(f) and 1395. When a statute contains an express preemption clause, courts "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Marking the precise boundaries of federal law is critical. The task is to

"identify the domain expressly pre-empted by that language." *Medtronic v. Lohr*, 518 U.S. 470, 484 (1996) (cleaned up). And it is evident that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Ligett Grp., Inc.*, 505 U.S. 504, 517 (1992). That is why "express provisions for preemption of some state laws imply that Congress intentionally did not preempt state law generally, or in respects other than those it addressed." *Keams v. Tempe Tech. Inst., Inc.*, 39 F.3d 222, 225 (9th Cir. 1994).

The question, then, is whether the express preemption clauses governing EMTALA support "the pre-emptive reach" justifying the preliminary injunction. *Cipollone*, 505 U.S. at 517. They don't.

2. Section 622 does not "directly conflict" with EMTALA.

EMTALA contains an express "non-preemption provision." *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 993 (9th Cir. 2001), which says, "[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). Non-preemption is the baseline: EMTALA generally "do[es] *not* preempt any State or local law requirement." *Id.* (emphasis added). Preemption occurs only where state law "*directly* conflicts with a requirement of this section," *Id.* (emphasis added). The adverb matters. To justify preemption, a state law must conflict with EMTALA "directly." *Id.*

Ninth Circuit precedent affirms that EMTALA does not dictate particular standards of medical care. *Eberhardt v. Los Angeles*, 62 F.3d 1253 (9th Cir. 1995),

rejected an EMTALA claim against a physician for not "conduct[ing] a psychiatric evaluation or a mental status evaluation" for a man later killed by the police following a violent psychiatric episode. *Id.* at 1255. "EMTALA clearly declines to impose on hospitals a national standard of care in screening patients." *Id.* at 1258. The Court explained that "Congress enacted the EMTALA not to improve the overall standard of medical care, but to ensure that hospitals do not refuse essential emergency care because of a patient's inability to pay." *Id.*

Other Ninth Circuit decisions are equally insistent that EMTALA does not prescribe standards of medical care beyond the statute's overt requirements. *See Baker*, 260 F.3d at 993 ("The statute is 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."); *Bryant v. Adventist Health Sys./West*, 289 F.3d 1162, 1166 (9th Cir. 2002) ("EMTALA, however, was not enacted to establish a federal medical malpractice cause of action nor to establish a national standard of care.").

Other circuits agree that EMTALA does not preempt state standards of medical care. *Hardy v. New York City Health Hosp. Corp.*, 164 F.3d 789, 795 (2d Cir. 1999) (EMTALA's non-preemption clause suggests "that one of Congress's objectives was that EMTALA would peacefully coexist with applicable state 'requirements'"); *Bryan v. Rectors and Visitors of Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996) ("[T]he legal adequacy of that [stabilizing] care is then governed not by EMTALA but by the state malpractice law that everyone agrees EMTALA was not intended to preempt.").

EMTALA preempts state law only when it contradicts the statute's express requirements. *Root v. New Liberty Hospital District*, 209 F.3d 1068 (8th Cir. 2000), illustrates. There, the Eighth Circuit held that EMTALA preempted a Missouri statute immunizing state political subdivisions like hospital districts, from tort suits. Because that law directly conflicts with EMTALA's guarantee of a personal damage suit, 42 U.S.C. § 1395dd(d)(2)(A), the Court of Appeals concluded that "Missouri's sovereign immunity statute must yield." *Id.* at 1070. *Root* teaches that EMTALA preempts state law only when a state law conflicts with its express terms. *See id.* at 1069. Unlike *Root*, the District Court's preemption analysis rests on an implied duty under EMTALA. App. 56a. Since EMTALA has no express requirement requiring abortion, it does not preempt section 622. *See* 42 U.S.C. § 1395dd(f).

3. EMTALA cannot preempt Idaho law under the Medicare Act.

EMTALA's preemptive reach is further shortened by the Medicare Act. Its express preemption clause says this:

> Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided … or to exercise any supervision or control over the administration or operation of any such institution, agency, or person.

42 U.S.C. § 1395.

This clause establishes that "the practice of medicine is, in general, a subject of state regulation." *Pennsylvania Med. Soc'y v. Marconis*, 942 F.2d 842, 846 n.4 (3d Cir. 1991); *accord In re Pharm. Indus. Average Wholesale Price Lit.*, 582 F.3d 156, 175 (1st Cir. 2009) (construing section 1395 to mean that the Medicare Act "reserves a regulatory role to the states" and "demonstrates Congress's intent to minimize

federal intrusion into the area."). Courts have interpreted section 1395 as a bar to preempting state consumer protection laws, *see id.*, and state standards of medical care, *see McCall v. PacifiCare of Cal., Inc.*, 21 P.3d 1189, 1197 (Cal. 2001) (the Medicare Act does not displace state tort law). So too, here. Because EMTALA is bound by section 1395 it cannot be construed as "a mechanism to supervise or control the practice of medicine." *American Acad. of Ophthalmology, Inc. v. Sullivan*, 998 F.2d 377, 387 (6th Cir. 1993). By overriding Idaho's regulation of abortion, the preliminary injunction does exactly that.

4. The District Court misjudged EMTALA's preemptive scope.

The District Court miscalculated EMTALA's limited "pre-emptive reach." *Cipollone*, 505 U.S. at 517.

First, it was mistaken to rule that section 622 "directly conflicts" with EMTALA. *See* App. 57a (citing *Draper*, 9 F.3d at 1393). The District Court analyzed the government's preemption claim under impossibility and obstacle preemption without considering that an implied duty under EMTALA cannot conflict with Idaho law "directly," 42 U.S.C. § 1395dd(f). App. 57a. Only state laws like the one challenged in *Root*, which contradict an express provision of EMTALA, 209 F.3d at 1070, are subject to EMTALA's preemption clause.

Even if impossibility and obstacle preemption were relevant—which we deny—the District Court unfairly moved the goal posts. Its preliminary injunction order cites section 622's supposed disallowance of pregnancy termination for ectopic pregnancies to illustrate the impossibility of complying with both EMTALA and Idaho law, App. 60a–61a, while its reconsideration order says that the inapplicability

of section 622 to the removal of an ectopic or other nonviable pregnancy (as declared by the Idaho Supreme Court) does not "fundamentally alter" the preemption analysis. App 32a. A similar turnabout tainted the Court's discussion of obstacle preemption. The preliminary injunction order singled out the supposed "deterrent effect" of section 622's use of affirmative defenses rather than outright exceptions, App. 64a–65a, but the reconsideration order failed to mention that the amended section 622 replaced affirmative defenses with exceptions. App. 34a.

Second, neither of the District Court's orders mention the Medicare Act's non-preemption clause, 42 U.S.C. § 1395. That clause forecloses EMTALA as a basis for preempting section 622, which embodies a state standard of medical care (proscribing abortion under particular circumstances) and a regulation of the medical profession (prescribing the suspension or loss of a medical license for violating the statute.) *See* IDAHO CODE § 18-622(1). As such, section 622 is the kind of state law that Congress intended to operate free from federal "supervision or control." 42 U.S.C. § 1395.

Because the District Court's orders exaggerate EMTALA's "pre-emptive reach," *Cipollone*, 505 U.S. at 517, the Legislature has a strong likelihood of success.

B. EMTALA Does Not Mandate Abortion.

1. The District Court badly misread EMTALA.

Even without a defective preemption analysis, the District Court's preliminary injunction is flawed because it rests on a misconstruction of EMTALA.

Accepting the government's claim, the District Court ruled that "EMTALA obligates the treating physician to provide stabilizing treatment, including abortion

care." App. 57a. Without that obligation, EMTALA does not require what Idaho law forbids. A close reading of the statute denies any support for such an obligation.

It is undisputed that EMTALA requires a Medicare-participating hospital to provide "stabilizing treatment" when a screening exam concludes that a patient has an emergency medical condition. 42 U.S.C. § 1395dd(b) (heading); *accord id.* § 1395dd(b)(1)(A) (requiring "such treatment as may be required to stabilize the [emergency] medical condition"). But neither of those provisions—nor anywhere else in EMTALA—mention the word abortion. The only form of stabilizing treatment expressly endorsed by the statute is delivering a child when a pregnant woman with contractions has an emergency medical condition. *Id.* § 1395dd(e)(3)(A). That Congress expressly endorsed delivery as a stabilizing treatment surely counts against the government's contention that EMTALA demands access to abortion.

So do other textual clues. Under EMTALA, "stabilized" means that "no material deterioration of the [emergency medical] condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility." *Id.* at § 1395dd(e)(3)(B). The corresponding definition of "emergency medical condition" requires medical care when a pregnant woman has a condition placing "the health of the woman *or her unborn child* in serious jeopardy." *Id.* § 1395dd(e)(1)(A)(i) (emphasis added). Since abortion exposes the unborn child to "serious jeopardy," it cannot be a legitimate "stabilizing treatment" under the statute. *Id.* § 1395dd(b).

Still other textual clues point away from the District Court's construction. EMTALA contains four provisions expressly requiring emergency care for both a pregnant woman and her unborn child. *See* 42 U.S.C. §§ 1395dd(e)(1)(A)(i); 1395dd(e)(1)(B)(ii); 1395dd(c)(1)(A)(ii); and 1395dd(c)(2)(A). The preliminary injunction order casts aside half the pivotal definition of "emergency medical condition" as it addresses "a pregnant woman who is having contractions." *Id.* § 1395dd(e)(1)(B). The proffered explanation for ignoring that language is that the Court regarded subsection (B) as "not relevant." App. 42a n.1. But that explanation is implausible. Relevance is self-evident, considering that the United States invokes EMTALA as the source of a federal mandate concerning medical treatment for pregnant women. That the District Court disregarded EMTALA's text heightens the sense that the preliminary injunction rests on quicksand. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.") (citation omitted).

Worse, the District Court deliberately excised EMTALA's remaining reference to the medical needs of an unborn child in the operative language of the preliminary injunction. EMTALA says that an "emergency medical condition" exists when the absence of "immediate medical attention" probably will result in "placing the health of the individual (or, with respect to a pregnant woman, the health of the woman *or her unborn child*) in serious jeopardy." 42 U.S.C. § 1395dd(e)(1)(A) (emphasis added). Yet the lower court selectively quoted from the statute, thereby effectively removing the phrase "or her unborn child" from its injunction. *See* App. 77a (prohibiting the

enforcement of section 622 insofar as an abortion is "necessary to avoid (i) 'placing the health of' a pregnant patient 'in serious jeopardy'").

Through these two errors—disregarding relevant statutory language about the medical treatment of pregnant women and removing the phrase "or unborn child" from its injunction—the District Court effectively rewrote EMTALA. Where EMTALA guarantees emergency medical care for a pregnant woman *and* her unborn child, the District Court read the statute as protecting the woman alone.

2. The District Court violated the major questions doctrine—or at least the ordinary rules of statutory construction.

A troubling implication of the District Court's decision is ceding to the Executive Branch authority that Congress did not delegate. Courts presume that Congress will "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). When that occurs, "something more than a merely plausible textual basis" is necessary, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022): only "clear congressional authorization" will do. *Util. Air*, 573 U.S. at 324. Indeed, "exceedingly clear language" is necessary if Congress "wishes to significantly alter the balance between federal and state power." *U.S Forest Serv. v. Cowpasture River Preserv. Assn.*, 140 S. Ct. 1837, 1850 (2020). Requiring "a clear statement," *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023), of congressional authority to justify the consequential exercise of executive power rests on "both separation of powers principles and a practical understanding of legislative intent." *West Virginia*, 142 S. Ct. at 2609. Like other clear-statement rules, the major questions doctrine "ensure[s] Congress does

not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005).

The major questions doctrine has figured prominently in recent terms. *See West Virginia*, 142 S. Ct. at 2616 (voiding an EPA rule because "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body"); *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (setting aside an OSHA standard requiring large employers to ensure that their employees were vaccinated against COVID-19); *Ala. Assoc. of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485 (2021) (voiding a nationwide eviction moratorium imposed by the Centers for Disease Control). Only months ago, *Biden* held that the Department of Education exceeded its authority by instituting a loan-forgiveness program in reliance on the HEROES Act. 143 S. Ct. at 2372–73.

The legal theory underlying the preliminary injunction here fits the pattern of such decisions. Like the OSHA vaccination mandate, an EMTALA abortion mandate combines a "lack of historical precedent" with a startling "breadth of authority." *NFIB*, 142 S. Ct. at 666 (quoting *Free Enter. Fund v. Pub. Co. Acc't Oversight Bd.*, 561 U.S. 477, 505 (2010)) (cleaned up). Like the CDC's eviction moratorium, the United States leans on "a wafer-thin reed"—EMTALA's generic obligation to provide stabilizing treatment—to justify "such sweeping power." *Ala. Assoc.*, 141 S. Ct. at 2489. Like the EPA's electricity generation rule, the United States has interpreted EMTALA as a national abortion mandate that "Congress had conspicuously and

repeatedly declined to enact itself," *West Virginia*, 142 S. Ct. at 2610. *See* Women's Health Protection Act of 2023, H.R. 8296, 117th Cong. §§ 4(a)(1), 5(a)(1) (2022) (proposed legislation prescribing a federal right to "abortion services" that would "supersede" contrary state law); S. 4132, 117th Cong. §§ 3(a)(1), 4(a)(1) (2022) (same). And like the Attorney General's interpretive rule concerning assisted suicide, the government's claim to authority is "incongruous with [EMTALA's] statutory purposes and design." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). *Gonzales* rightly concluded that an "oblique form" of statutory authority is insufficient when the assertion of executive power concerns a matter of "earnest and profound debate across the country." *Id.* (quotation omitted). Here, it is just as objectionable to read EMTALA as an "implicit delegation" of authority to compel physicians to perform abortions prohibited by state law based on the statute's "oblique" language. *Id.*

Because EMTALA does not confer clear congressional authority for the abortion mandate the United States asserts, the major questions doctrine applies.

The District Court's handling of EMTALA raises additional concerns. Unlike the HEROES Act, EMTALA is not a statute enacted to address unpredictable national emergencies, *Biden*, 143 S. Ct. at 2399 (Kagan, J., dissenting), and the provision relied on by the United States directs hospitals to provide "stabilizing care" for patients. It does not confer on HHS "broad emergency powers." *Id.* The District Court's statutory analysis distorts the text. A statute that endorses delivery as stabilizing treatment and mentions unborn children four times is (to say the least) an unpromising candidate for a national abortion mandate. That the lower court

disregarded or excised those references suggests that the preliminary injunction rests not so much on the EMTALA that Congress enacted but on the EMTALA the government and the District Court preferred. That approach flouts the principle that a federal agency "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Com'n v. FCC*, 476 U.S. 355, 374 (1986).

Sanctioning the government's new-found power under EMTALA would have profoundly troubling consequences. Allowing the United States to treat EMTALA's duty of stabilizing treatment as a blank page to fill with the Executive Branch's preferred medical policy would empower the government to impose federal mandates compelling hospitals to provide any sort of medical procedures—so long as the purported mandate can be framed as "necessary stabilizing treatment." 42 U.S.C. § 1395dd(b). Such an approach would displace Congress's role as the Nation's lawmaker and the States' historic police power to regulate medical care.

C. The District Court Likewise Misconstrued Section 622.

Although EMTALA contains no abortion mandate with which the State of Idaho must comply, we want to correct the record about how section 622 actually operates because the District Court got the state side of its federal-state conflict wrong too. In the Court's opinion, "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." App. 57a. Going further, the Court characterized section 622 as an impediment to decent medical care for a pregnant woman in distress. *See* App. 74a–75a (describing "the

pregnant patient, laying on a gurney in an emergency room facing the terrifying prospect of a pregnancy complication that may claim her life" but where "her doctors feel hobbled by an Idaho law that does not allow them to provide the medical care necessary to save her health and life"). Not so. Section 622 does not discourage a doctor from protecting a pregnant woman's life and health.

First, the statute wholly exempts a woman who obtains an abortion. IDAHO CODE § 18-622(5). She faces no liability at all. Full stop.

Second, Idaho law does not treat all medical procedures terminating a pregnancy as an abortion. The Idaho Supreme Court has clarified that section 622 does not cover ectopic or other non-viable pregnancies. *See Planned Parenthood*, 522 P.3d at 1202–03. Further, section 622 does not apply when necessary medical treatment accidentally results in the death of an unborn child. *See* IDAHO CODE §§ 18-622(4) (statutory exemption); 18-604(1) (defining *abortion* as using some means "to intentionally terminate" a pregnancy).

Third, recent amendments clarify that section 622 contains straightforward exceptions. *See* H.B. 374, 67th Leg., 1st Sess. (Idaho 2023). An abortion performed to save a woman's life or (during the first trimester) to address a pregnancy from rape or incest "shall not be considered criminal abortions." IDAHO CODE §§ 18-622(2); 18-622(2)(b). Nor does a physician face prosecution for an abortion performed in the belief that a woman's life was at risk. Mistakes of fact are no basis for prosecution. These exceptions form a safe harbor for a physician who acts "in his good faith medical judgment and based on the facts known to the physician at the time." *Id.* §§ 18-

622(2)(a)(i), (ii). Within that zone, section 622 should no longer "deter physicians from providing abortions in some emergency situations." App. 31a.

Far from posing an arbitrary obstacle to medical care, section 622 simply restores Idaho law to its pre-*Roe* condition. *See Planned Parenthood*, 532 P.3d at 807 (Abortion was a crime under Idaho law from territorial days until *Roe*). By prohibiting abortion unless necessary to save a woman's life or end a pregnancy resulting from rape or incest, section 622 fairly reflects Idaho's "history and traditions" under which a nontherapeutic "abortion was viewed as an immoral act and treated as a crime." *Planned Parenthood*, 522 P.3d at 1148.

In short, the federal-state conflict for which the District Court issued a preliminary injunction is false at both ends. Reading EMTALA as an abortion mandate defeats Congress's evident intent to secure emergency medical care for both a pregnant woman and her unborn child, and Idaho's section 622 is not the draconian measure depicted by the District Court. Without a conflict between EMTALA and section 622, the preliminary injunction lacks any foundation in law.

D. Enjoining Section 622 Because of EMTALA is Unconstitutional.

1. The preliminary injunction violates the Tenth Amendment.

Dobbs held that "the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 142 S. Ct. at 2279. By enjoining section 622 based on a misreading of EMTALA, the District Court denies Idaho's authority to regulate abortion.

Structural implications follow from reserving legislative power to states. *Dobbs* contemplates that abortion will be regulated in a way that "will be more sensitive to the diverse needs of a heterogenous society," that "increases opportunity for citizen involvement in democratic process," that "allows for more innovation and experimentation in government," and that "makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citation omitted). All these virtues of a federal system guarded by the Tenth Amendment naturally follow from *Dobbs's* determination that states hold the power to regulate abortion.

The preliminary injunction generates the contrary implications. It rests on the Supremacy Clause, which the court described as a rule that "state law must yield to federal law when it's impossible to comply with both." App. 41a. Waving aside concerns about Idaho's sovereignty, the Court added that "*Dobbs* did not overrule the Supremacy Clause … even when it comes to regulating abortion, state law must yield to conflicting federal law." App. 76a. This misconceives the nature of the Supremacy Clause. True, "if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment." *Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007). But "[t]his is an extraordinary power in a federalist system … that we must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. A federal agency can distort our federal system, no less than the separation of powers, by exercising authority that Congress does not confer. That is why this Court insists on "exceedingly clear language" if federal law is to "alter the balance between federal

and state power," *Cowpasture River*, 140 S. Ct. at 1849–50. But such "exceedingly clear" delegation of authority to HHS, *id.* at 1849, is hardly satisfied by EMTALA's requirement to provide "necessary stabilizing treatment." 42 U.S.C. § 1395dd(b).

2. The decision below violates the Spending Clause.

The construction of EMTALA adopted by the District Court also transgresses the Spending Clause. *See* U.S. CONST. art. I, § 8.

First, that Clause forbids the United States from coercing an unwilling state into complying with a regulatory command. *See NFIB v. Sebelius*, 567 U.S. 519, 582 (2012) (holding that a provision of the ACA amounted to "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion"). Here, the United States says that section 622 denies it "the benefit of its bargain … by affirmatively prohibiting Idaho hospitals from complying with certain obligations under EMTALA." Complaint at 13. The government adds that section 622 "undermines the overall Medicare program and the funds that the United States provides in connection with that program." *Id.* at 13–14. This suggests that Idaho hospitals must perform abortions when the United States says that EMTALA requires it or risk the loss of billions in Medicare funding. The scale of that risk is eye-popping. Idaho received "approximately $3.4 billion in federal Medicare funds" between 2018 and 2020. U.S.A. Mem. ISO Mot. for Prelim. Inj. at 6, *United States v. Idaho*, No. 1:22-cv-00329-BLW (D. Idaho Aug. 8, 2022), ECF No. 17-1. HHS Secretary Becerra made the threat crystal clear by warning Medicare-funded hospitals that adherence to State law rather than complying with the government's conception of

EMTALA risks "termination of its Medicare provider agreement." Letter from Secretary Becerra to Health Care Providers, July 11, 2022, at 2, available at https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf. The State of Idaho thus faces the loss of billions in Medicare funding unless it obeys the government's abortion mandate, for which EMTALA is little more than window dressing.

Second, the abortion mandate requirement pressed by the United States is retroactive. It comes long after Idaho agreed to the conditions of participating in Medicare. Imposing a novel mandate retroactively is another way that the government violates the Spending Clause. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

III. THE PUBLIC INTEREST AND THE EQUITIES FAVOR A STAY.

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

What matters are "the relative harms to applicant and respondent, as well as the interests of the public at large." *Trump v. Int'l Refugee Assistance Proj.*, 138 S. Ct. 2080, 2087 (2017) (quoting *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surg. Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers (cleaned up)). Start with the harm to the Legislature. Enjoining section 622 inflicts an irreparable harm on the State of Idaho and its institutions, including the Legislature, *King*, 567 U.S. at 1303. Judicial interference with state law is an independent injury.

By contrast, the United States will not suffer an irreparable injury from a stay. Ninth Circuit precedent has rebuffed "general pronouncements that a Supremacy Clause violation alone constitutes sufficient harm to warrant an injunction." *United States v. California*, 921 F.3d 865, 894 (9th Cir. 2019). But "[g]eneral pronouncements" are all the United States has to offer. *Id.* Letting a preempted state law operate could impose irreparable harm on the United States—but only if its claim of preemption is valid. *See United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *rev'd in part on other grounds*, 567 U.S. 387 (2012). And that seems highly doubtful considering the flaws in the government's preemption claim. Any harm from waiting to persuade an appellate panel that EMTALA preempts section 622 before enjoining Idaho law is hardly "irreparable" since the government "may yet pursue and vindicate its interests in the full course of this litigation." *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (per curiam), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017).

The public interest lies in preserving the integrity of EMTALA as adopted by Congress and by "maintaining our constitutional structure" of powers divided among the three branches of the national government and between the federal government and the states. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). *See also Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (public interest would be served by "respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest"). *Dobbs* reserves to States like Idaho the authority to regulate abortion. Beyond that,

EMTALA's text expresses Congress's sense of the public interest—that the life and health of both a pregnant woman and her unborn child deserve federal protection. *See* 42 U.S.C. § 1395dd(e)(1). At the same time, EMTALA embodies a legislative determination to respect a State's traditional authority over public health, which is why EMTALA is governed by express non-preemption clauses limiting the statute's preemptive reach. *See* 42 U.S.C. § 1395dd(f), 42 U.S.C. § 1395.

The District Court saw the public interest in starkly different terms. The preliminary injunction order accepted as a "key consideration … what impact an injunction would have on non-parties and the public at large." App. 74a (citing *Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003)). Public interest would be best served, in the Court's view, by vindicating the government's claim under the Supremacy Clause. *See id.* Added to that, "allowing the Idaho law to go into effect would threaten severe, irreparable harm to pregnant patients in Idaho." *Id.* Hospital capacity in neighboring states "would be pressured as patients may choose to cross state lines to get the emergency care they are entitled to receive under federal law." App. 75a. Compared with these interests, the opinion concluded that "the State of Idaho will not suffer any real harm if the Court issues the modest preliminary injunction the United States is requesting." App. 76a.

This analysis goes astray in several respects.

First, the District Court overlooked the irreparable harm that the preliminary injunction inflicts on the State. *King*, 567 U.S. at 1303.

Second, a concern with the Supremacy Clause is overblown when the United States produces only "general pronouncements that a Supremacy Clause violation alone constitutes sufficient harm to warrant an injunction." *California*, 921 F.3d at 894. Nor, to be clear, can third-party harm relieve the United States of the duty to show injury to itself. *Nken*, 556 U.S. at 426.

Third, concern with third-party harm cannot overshadow irreparable injury and the likelihood of success when evaluating equitable relief. *Id.* at 434 (the "first two factors of the traditional standard are the most critical"). Concern with non-parties should not distract from the government's failure to demonstrate a likelihood of success—"the most important" factor in considering interim equitable relief. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

Fourth, the District Court misstates Idaho law. The lower court relied on declarations prepared within a three-week period that have never been tested at trial, to portray section 622 as a brutal threat to Idaho women. It isn't so. The complaint says that "ectopic pregnancy, severe preeclampsia, or a pregnancy complication threatening septic infections or hemorrhage … could be deemed an 'abortion' under Idaho law." Complaint at 7. The Idaho Supreme Court has conclusively held otherwise—that section 622 does not cover ectopic or other non-viable pregnancies and that it authorizes an abortion to save a woman's life. *See Planned Parenthood*, 522 P.3d at 1202–03. Even if other emergency medical conditions pose serious risks to women, the legal analysis remains unchanged. Under EMTALA, what matters is whether a pregnant woman with an emergency medical condition can get emergency

treatment to preserve her health and life; whether an abortion is available in every such instance is beside the point. The difficult questions that arise in deciding when abortion should be legal belong to the people of Idaho and their elected representatives—not to federal agencies wielding a contrived mandate.

CONCLUSION

Dobbs assured the country that the American people and their elected representatives have the authority to regulate abortion. 142 S. Ct. at 2279. The District Court's preliminary injunction, founded on an unprecedented construction of federal law, thwarts Idaho's sovereign authority to regulate abortion as it has done through most of its history. To avoid irreparable harm to the State while the Legislature defends Idaho law on the merits, the Legislature respectfully requests an administrative stay, if necessary, and a stay of the preliminary injunction pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought.

Respectfully submitted,

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November 20, 2023