No. 23-35153

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF IDAHO,

Defendant-Appellee,

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.

On Appeal from the United States District Court
for the District of Idaho

UNITED STATES'S SUPPLEMENTAL EXCERPTS OF RECORD

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INDEX

Memorandum Decision and Order Denying Motions to Reconsider,
Dkt. No. 135 (entered May 5, 2023) SER-3

State of Idaho's Supplemental Brief Re: Motion to Reconsider,
Dkt. No. 127 (filed February 6, 2023).......... SER-15

Idaho Legislature's Supplemental Brief Re: Motion to Reconsider,
Dkt. No. 126 (filed February 6, 2023).......... SER-29

Transcript of August 22, 2022 Proceedings,
Dkt. No. 96 (filed August 25, 2022).......... SER-49

Docket Sheet.......... SER-126

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

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UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF IDAHO, Defendant.	Case No. 1:22-cv-00329-BLW **SUPPLEMENTAL BRIEF SUPPORTING STATE OF IDAHO'S MOTION FOR RECONSIDERATION [Dkt. 101]**

TABLE OF CONTENTS

DISCUSSION 2

A. This Court's interpretation of the affirmative defense as being ambiguous and requiring physicians to make "inscrutable" decisions regarding "imminency of death" is simply incorrect 2

B. Termination of ectopic pregnancies and other non-viable pregnancies are not abortions 7

CONCLUSION 8

TABLE OF CASES AND AUTHORITIES

Cases

Planned Parenthood Great N.W., Haw., Alaska, Ind., Ky. v. State of Idaho,
Nos. 49615, 49817, 49899, 2023 WL 110626 (Idaho 2023) 1

R.R. Comm'n of Tex. v. Pullman Co.,
312 U.S. 496 (1941) 1

Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.,
5 F.3d 1255 (9th Cir. 1993) 7

Spears v. State,
278 So. 2d 443 (Miss. 1973) 3

Whole Women's Health v. Jackson,
142 S. Ct. 522 (2021) 1

Idaho Code

Idaho Code § 18-622 ....*passim*

Rules

Idaho Appellate Rule 38(b) 1

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fourth, this Court's impossibility preemption analysis, Dkt. 95 at 19-24, concluded it was impossible for a physician to comply both with EMTALA and Idaho's law. The State has already explained why this is not the case because "there is no direct conflict between the state law defining the bounds of care that can be provided and a requirement of EMTALA to provide stabilizing treatment within those bounds." Dkt. 101-1 at 9-13. The impossibility preemption analysis also relied on an incorrect understanding of the affirmative defense, finding that "the patient's death must be imminent or certain absent an abortion." Dkt. 95 at 21. Again, this understanding is simply insupportable under the Idaho Supreme Court's interpretation discussed above. Additionally, the impossibility preemption analysis faulted the defense for having a scope that "is tremendously ambiguous" and relied on the interpretation of the defense that the Court discussed in its obstacle preemption analysis—which, as shown above, was faulty. *Id.*

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

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

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

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

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

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

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

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

CONCLUSION

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

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

DATED: February 6, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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

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I HEREBY CERTIFY that on this 6th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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/s/ Steven L. Olsen
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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF IDAHO,

Defendant.

and

MIKE MOYLE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his capacity as President Pro Tempore of the Idaho State Senate; and the SIXTY-SEVENTH IDAHO LEGISLATURE,

Intervenor-Defendants.

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

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

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TABLE OF CONTENTS

INTRODUCTION 1

I. The Idaho Supreme Court's recent decision conclusively refutes the Government's interpretation of Idaho law 1

II. Because the Government's case is materially premised on its gross misconstruction of Section 622, the Government can no longer show that it will likely succeed on the merits 2

III. The preliminary injunction is also materially premised on an error regarding EMTALA 4

IV. The Government's deliberate elision of EMTALA's language protecting unborn children shows why the Government's case violates the major questions doctrine 8

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF CASES AND AUTHORITIES

Cases:

Alabama Assoc. of Realtors v. Dep't of Health and Human Servs.
141 S. Ct. 2485 (2021) 9, 10

NFIB v. OSHA
142 S. Ct. 661 (2022) 9

Paulson v. City of San Diego
294 F.3d 1124 (9th Cir. 2002)..2

Planned Parenthood Great Northwest v. State of Idaho
Docket No. 49615 (2022)...1, 2

Texas v. Becerra
No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022).............6, 7

Utility Air Regulatory Group v. EPA
573 U.S. 302 (2014) 9, 10

W. Va. v. EPA
142 S. Ct. 2587 (2022) 9

Winter v. Natural Resources Defense Council, Inc.
555 U.S. 7 (2008) 2, 4

Statutes:

I.C. § 18-622...1, 2, 3, 4, 7, 8

42 U.S.C. § 1395..1, 4, 5, 9

Other Authorities:

EMTALA..1, 2, 4, 5, 6, 7, 8, 9, 10

Major questions doctrine 8, 9

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *1.

Becerra unsparingly rejected the same arguments urged here:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The major questions doctrine likewise applies here.

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

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

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

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

Conclusion

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

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

Date: February 6, 2023

Respectfully submitted,
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Case: 23-35450, 08/21/2023, ID: 12777261, DktEntry: 24-3, Page 42 of 159

CERTIFICATE OF SERVICE

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

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *59.

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF IDAHO**

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UNITED STATES OF AMERICA, Plaintiff, vs. THE STATE OF IDAHO, Defendant, and SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his capacity as President Pro Tempore of the Idaho State Senate; and the SIXTY-SIXTH IDAHO LEGISLATURE, Intervenor-Defendants. ______________________________	)	CASE NO. 1:22-cv-00329-BLW **MOTION HEARING**

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17 **TRANSCRIPT OF PROCEEDINGS**
BEFORE THE HONORABLE B. LYNN WINMILL
MONDAY, AUGUST 22, 2022; 9:02 A.M.
18 **BOISE, IDAHO**

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22 Proceedings recorded by mechanical stenography, transcript produced by computer.

23 ____

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1 I N D E X

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Proceeding **Page**

4

Argument by Mr. Netter............................. 10
5 Argument by Mr. Church............................. 23
Argument by Mr. Stewart............................ 54
6 Argument by Mr. Netter............................. 67
Court takes under advisement....................... 74

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1 P R O C E E D I N G S
2 August 22, 2022
3 THE CLERK: The Court will now hear Civil Case 22-329,
4 *United States of America vs. The State of Idaho*, regarding
5 plaintiff's motion for a preliminary injunction.
6 THE COURT: Good morning, Counsel.
7 Before we take up this matter, I did want -- we did
8 provide a call-in number. I don't know if anyone has taken
9 advantage of that, but it's something that we have only been
10 able to do during the pandemic. But I did need to remind anyone
11 who is listening in that it is against federal law to try to
12 record court proceedings even from a remote location.
13 Of course, that would apply to anyone here in the
14 courtroom as well, but we're usually not as concerned about that
15 happening as we would if someone were simply listening in by a
16 telephone connection.
17 As we begin, I have given counsel 45 minutes per side.
18 I'm going to make some initial observations intended just to
19 point out where I have some concerns so that you can target your
20 argument appropriately.
21 I do want to point out at the outset my appreciation
22 for the considerable energy and skill demonstrated by the briefs
23 and declarations which the parties have submitted. It's been
24 immensely helpful, created a lot of work. The amicus briefing
25 was also excellent and provided, I think, a real broad

1 understanding as to the various points in this.

2 Now, before I actually get to offering those initial
3 observations, I hope it is clear to everyone here, this is not a
4 case about the wisdom of *Dobbs* or the wisdom of *Roe v. Wade*.
5 That really is completely secondary to this decision. *Dobbs* is
6 the law of the land, and that will not be questioned here. The
7 only question is resolving a conflict or apparent conflict
8 between federal and state law under the supremacy clause of the
9 United States Constitution.

10 Now, let me address some of the concerns. I think I
11 have two or three concerns for the State and one concern for the
12 Government, but I'm offering them here because you both may want
13 to comment on them.

14 It struck me that the State, both in their
15 brief -- both in their briefing and in their declarations,
16 attempted to state their arguments in language other than what
17 was actually included in Idaho's abortion statute.

18 Routinely you argued, both in briefing and in
19 declarations, that the statute provides an affirmative defense
20 to a doctor who may be prosecuted under its provisions if the
21 doctor has a good faith belief that the abortion was necessary
22 because the medical condition was life-threatening. That's the
23 word that was kind of pretty consistently used throughout the
24 briefing and declarations.

25 The United States, in its reply brief, makes a

1 compelling argument that this is a rewriting of the statute
2 since the statute only permits the affirmative defense if the
3 abortion was, quote, "necessary to prevent death," close quote.
4 So the question is: Does the statute provide for an
5 affirmative defense if the medical condition would be, without
6 an abortion, life-threatening, or is the abortion truly
7 necessary to prevent death, or are they the same thing?
8 But relying on Black's Law Dictionary and Idaho
9 Supreme Court cases, the U.S. makes a strong argument that
10 "necessary" means indispensable or absolutely needed.
11 And I guess I have to share that I have the same
12 concern that the statute would only provide the doctor with an
13 affirmative defense if he or she believed in good faith that the
14 patient would, in fact, die unless the abortion is performed.
15 And that is quite different from simply being life-threatening,
16 which suggests only a possibility of death.
17 So that's one issue I really want the State to hit
18 head on. And I would note you didn't have a chance to respond
19 to it because it came up in the reply brief. But then it only
20 came up in the reply brief because it was a kind of reframing of
21 the issue by the State in its response brief.
22 The second question is somewhat related, and it's
23 simply this: That even if the "necessary to prevent death"
24 language can be read as meaning life-threatening, that deals
25 only with situations where the patient's death is either going

1 to happen or is at least a probability.

2 But there are situations which I think have been

3 pointed out primarily in the amicus and the United States'

4 submissions where a doctor may well believe that in the hospital

5 setting, they can prevent or substantially reduce the chance of

6 the patient's death, but that there is still a substantial

7 likelihood that the patient will be left with serious medical

8 injuries if an abortion is not performed. They may be left

9 infertile or have temporary or permanent major organ failure or

10 have a stroke, leaving the patient with long-term serious

11 disability.

12 As I would note, the submissions from the

13 United States suggest that is more than just a hypothetical

14 concern.

15 My concern is that in that setting, where the death of

16 the patient is not likely but it is still going to have very

17 serious medical consequences for the patient, there would seem

18 to be just an absolute conflict between EMTALA and the Idaho

19 abortion statute.

20 So on that front, it strikes me at least initially

21 that the impossibility preemption applies. And I need to have

22 the State hit that head on, why that is not truly a conflict

23 between the statutes.

24 Okay. For the Government, here is the concern I would

25 like to make sure you address: In this case, it appears that we

1 have express preemption because of the language of EMTALA. And
2 since the touchstone of preemption is Congressional intent, then
3 is it not true that the Idaho abortion statute is only preempted
4 if it directly conflicts with EMTALA? That's the language in
5 EMTALA itself. There must be a direct conflict, or there is no
6 preemption.
7 So does that make the implied preemption principle,
8 such as impossibility and obstacle preemption, not relevant?
9 And then how does that bear upon this case?
10 So those are the three concerns I thought I would
11 throw -- I know I'll have questions as we get into this more
12 deeply, but I wanted counsel to be aware of at least those three
13 concerns.
14 I guess just one last observation that is more general
15 in nature. You know, I have been a judge for a lot of years. I
16 have sat and observed the application of our criminal laws, and
17 I think it's pretty obvious that our legislature and Congress
18 think that passing criminal laws will change behavior. And from
19 my time on the bench, I have seen that change in behavior
20 applies not just in the core of the criminal statute but around
21 the edges.
22 Simply put, we assume that rational people will not
23 just literally comply with the criminal statute but will avoid
24 conduct which might even be viewed as violating the statute
25 simply because of the impact of being charged even if you're

1 able to obtain an acquittal.

2 Intentionally or otherwise, the abortion statute, if

3 that premise is correct, will cause doctors to steer clear of

4 conduct that could be seen as violating the Idaho abortion

5 statute. It would be a rare situation where a doctor is going

6 to be willing or anxious to push the limits and go right up to

7 the edge of what is allowed under the Idaho abortion statute.

8 In essence, they will seek a safe harbor in which they have no

9 chance of prosecution.

10 Does that almost not create obstacle preemption if the

11 doctors are risk averse? I mean, I think it's in the very

12 nature of their profession.

13 So I want, again, counsel to be aware that I just had

14 that general concern that really is a reflection of what I have

15 observed as a judge in handling a lot of criminal cases and kind

16 of having a sense of what Congress and the legislature intend

17 when they pass criminal laws trying to not only criminalize

18 behavior but change behavior both directly within the statute

19 and on its edges.

20 So, with that, let's go ahead and begin.

21 Mr. Netter, I think you'll start. I understand you're

22 going to reserve 20 minutes for rebuttal. And we have a clock,

23 which is more for your aid. I actually use it pretty strictly

24 in some cases to keep attorneys on time. I don't think that

25 will be too much of an issue because we have given you a lot of

1 time to argue, but it will give you some idea of where you are
2 with the time allotted.
3 So, Mr. Netter.
4 MR. NETTER: Thank you, Your Honor.
5 Good morning, Your Honor. May it please the Court.
6 Brian Netter, U.S. Department of Justice, for the United States.
7 Each of us will, at some point in our lives, encounter
8 a medical emergency for ourselves, for a friend, for a loved
9 one. We hope that when that point of medical crisis arrives,
10 the person in need is able to get to a hospital where a doctor
11 or a nurse who has trained their entire professional life for
12 that moment, trained for years, will know the right treatment to
13 administer.
14 And although perhaps it should go unsaid, we hope that
15 in that moment, the doctor or the nurse will be able to
16 administer the treatment, will not be precluded, will not be
17 forced to hesitate out of fear that the doctor or nurse, him or
18 herself, will face criminal sanctions.
19 As the Court has acknowledged, this case arises under
20 a federal law called EMTALA, the Emergency Medical Treatment and
21 Labor Act. Under EMTALA, when a patient arrives at a
22 participating hospital with an emergency medical condition, the
23 physician is required to offer what's called a stabilizing
24 treatment. Any state law that conflicts directly with that
25 requirement is preempted.

1 So let me address right here at the outset the Court's
2 question about what preemption means in the context of EMTALA,
3 because that is governed by binding Ninth Circuit precedent, a
4 case called *Draper vs. Chiapuzio* that was decided by the
5 Ninth Circuit in 1993.
6 In that case, the Ninth Circuit said, while construing
7 EMTALA, the key phrase is "directly conflicts." A state statute
8 directly conflicts with federal law in either of two cases:
9 First, if compliance with both federal and state regulations is
10 a physical impossibility or, second, if the state law is, quote,
11 "an obstacle to the accomplishment and execution of the full
12 purposes and objectives of Congress."
13 So we believe that answers the question and that both
14 physical impossibility and obstacle preemption are within the
15 scope of the statutory preemption provision of EMTALA.
16 THE COURT: Yeah. I read that decision, and I can't
17 disagree with it because it is -- well, I guess I can disagree
18 with it. I have to follow it because it's the Ninth Circuit
19 precedent. But it struck me as a little odd because there does
20 seem to be express preemption; and, as such, we look directly at
21 the language of the statute. And the statute says there is only
22 a conflict or preemption if there is direct conflict.
23 But you're right. I mean, that is the case that I
24 think governs that, but, you know, I'm going to -- I will wait
25 to hear what the legislature and the State of Idaho has to say,

1 but I did wonder at the time when I read the decision that they
2 seemed to be going a little further than they needed to; and
3 where there is express language about preemption, that would
4 seem to govern the issue.
5 But you hit the exact case. I mean, that was exactly
6 the response I thought you would make, but I wanted to hear you
7 make that argument.
8 Go ahead.
9 MR. NETTER: Well, let me just add one additional
10 point on that, Your Honor, which is that the legislative history
11 of EMTALA indicates that the purpose behind the preemption
12 provision was to ensure that states would be able to enforce
13 stricter laws that required even greater provision of emergency
14 care.
15 So it's sensible in that circumstance for the
16 preemption provision to be interpreted to prevent a state from
17 erecting obstacles to the full purposes and objectives of
18 Congress.
19 So we're here today, of course, because sometimes a
20 patient who arrives at a participating hospital with an
21 emergency medical condition is pregnant. And sometimes the
22 stabilizing treatment that is necessary to save the life or
23 protect the health of that patient is an abortion.
24 And yet, Idaho has a law set to go into effect this
25 week which the state supreme court has described as a total

1 abortion ban that is poised to subject doctors and nurses who
2 participate in any abortion to the felony criminal process.
3 Now, as the briefing in this case has demonstrated,
4 there are some issues on which the State, the legislature, and
5 the United States agree. Principally, everybody seems to agree
6 that there is some preemption; and to the extent that EMTALA
7 governs, the State of Idaho doesn't have the authority to
8 override that.
9 Additionally, the State and the intervenors appear to
10 agree that EMTALA does require abortions as a stabilizing
11 treatment under some circumstances.
12 The primary dispute between the parties is whether
13 there is an actual dispute: what the scope of the Idaho law is,
14 and how that compares to the protections afforded by EMTALA.
15 With respect to that, there are both legal and factual
16 angles. Primarily, of course, the interpretation of EMTALA and
17 the interpretation of Idaho law, that's a question of law for
18 this Court to determine.
19 Now, there are some additional factual questions as to
20 what actual medical conditions can arise that fit within the gap
21 between Idaho law and EMTALA.
22 As has been identified in the briefs and in the
23 accompanying declarations, there are a number of conditions that
24 affect pregnant individuals that would fall within this gap,
25 potentially including ectopic pregnancy, preterm/prelabor

1 rupture of membranes, placental abruption, preeclampsia with
2 severe features, sepsis, cardiovascular disease, and the list
3 goes on.
4 I would like to discuss a bit the facts and the
5 powerful declarations that were submitted by obstetricians and
6 gynecologists within the state of Ohio *[sic]* who are set to be
7 subject to this law in the coming days.
8 But first we should start with the law. Because the
9 way that 18-622 was crafted here is very telling, because the
10 Idaho Code part governing abortion contains a definition. It
11 has a definition for medical emergency. And the legislature
12 told us in its motion to intervene, Docket 15-1, that the
13 definition of medical emergency in the Idaho Code, which was
14 used by the legislature in the 2021 Heartbeat Law, was designed
15 to track EMTALA, and that 18-622, the Total Abortion Ban, was
16 intended to be narrower. When the legislature told us that, we
17 should believe it.
18 It's a standard canon of statutory interpretation that
19 when Congress or when a state legislature uses different
20 language to cover different concepts, a different outcome is
21 intended. That was certainly the case here.
22 There was an article published in the *Idaho Capitol*
23 *Sun* on Friday that transcribed some of the colloquy in the
24 committee hearing of the legislation that resulted in 18-622.
25 And I found that to be rather telling.

1 During the hearing of the House State Affairs
2 Committee, Representative Brooke Green asked the sponsor of the
3 legislation, Representative Todd Lakey, why there was no
4 exception for the health of the pregnant individual.
5 What he said is: "If you're talking about the health
6 of the mother, that's a nuanced decision that could be something
7 much less than life, where if the decision was based solely on a
8 question of some type of health, then you're talking about
9 taking the life of the unborn child," he said.
10 After Representative Green asked if that meant that
11 the health of the woman was irrelevant, Representative Lakey
12 said, "I would say it weighs less, yes, than the life of the
13 child."
14 So I think this indicates, Your Honor, that the
15 different framing, the different phrasing "necessary to prevent
16 the life" *[sic]* as opposed to the much broader categories that
17 appear in EMTALA and that appeared even in other abortion
18 restrictions adopted by this legislature, that that's
19 significant.
20 There is a reason why different language was adopted
21 here, and that reason requires the injunctive relief that has
22 been requested by the United States.
23 Of course, the text of 18-622 confirms that to be
24 true. The language "necessary to prevent the death" is not
25 couched in probabilistic terms. Necessary is absolute; it means

1 indispensable. The State confirmed as much in its submission to
2 the Idaho Supreme Court just 32 days ago in *Planned Parenthood*
3 *Great Northwest vs. State*.
4 In response to an argument that this language was
5 vague, the State said that the affirmative defense is available
6 only if the procedure is, quote, "essential to stop the death of
7 a pregnant woman."
8 THE COURT: This was from the oral argument before the
9 Idaho Supreme Court?
10 MR. NETTER: That was in the briefing --
11 THE COURT: The briefing.
12 MR. NETTER: -- that led to the oral argument. Yes,
13 Your Honor.
14 It's no wonder, under that standard, that physicians
15 are fearful of practicing under a regime in which federal law
16 and the Hippocratic oath require the provision of care, but
17 Idaho law says that providing the care potentially makes you a
18 felon.
19 So now much of the briefing, as a factual matter, has
20 hinged on the question of what the legislature calls relevant
21 abortions and whether they exist. The reality, which I think
22 each of us has experienced over the course of our lives, is that
23 pregnancies sometimes have complications. And that's true in
24 Idaho just as it's true everywhere else.
25 The legislature submitted what it called some official

1 data, trying to suggest that emergency abortions are exceedingly
2 rare in Idaho and that there have been only a handful over the
3 period covered by the data, the past 10 to 12 years. So I
4 wanted quickly to point out why that assessment of the data is
5 manifestly incorrect.
6 The legislature looked at official data that covered
7 only pregnant individuals who were less than 18 who were also
8 unable to obtain the consent of their parents or guardians or
9 pregnant individuals who were seeking an abortion more than
10 20 weeks after fertilization, which is at a gestational age of
11 22 weeks or later.
12 There is additional data that we have submitted in our
13 papers -- this is at Docket 86-6 at 10, which is ECF page 11 --
14 that indicates that abortions that take place after 22 weeks'
15 gestational age account for something like 0.1 percent of the
16 abortions in Idaho.
17 So the suggestion that there aren't emergency
18 abortions in this state is unfortunately incorrect, and the
19 declarations that we have submitted demonstrate that to be the
20 case.
21 And these are not only procedures that take place at
22 the moment where the doctor knows that if the procedure does not
23 happen, the patient will die. Medical needs occur on a spectrum
24 where there are times when a disease will progress, where there
25 could be organ damage, where there could be serious implications

1 for a patient's health and where waiting for additional
2 treatment is going to cause even greater complications. And
3 then there may be a later time when it is actually the case that
4 an abortion is truly necessary to save an individual's life, but
5 the costs that are borne during that interim period are serious
6 and reflect some of the delta between EMTALA and Idaho law.
7 I would refer the Court in particular to the
8 supplemental declaration of Dr. Emily Corrigan, who is an
9 obstetrician/gynecologist at Saint Alphonsus here in Boise. And
10 that's at Docket 86-3, and her initial declaration was at
11 Docket 17-6.
12 She identified three patients on which she was aware
13 of actual emergency abortions that had been necessary, Jane
14 Does 1, 2, and 3.
15 Jane Doe 1 experienced preterm/prelabor rupture of
16 membranes, and Dr. Corrigan said in her supplemental declaration
17 that, in some circumstances, it could become serious enough to
18 result in death, but it might just require limb amputations or a
19 hysterectomy.
20 Jane Doe No. 2 was suffering from a placental
21 abruption, where the placenta prematurely detaches from the
22 uterine wall. That condition, she testified, might just cause
23 kidney failure or a brain injury.
24 Jane Doe 3 had a condition called water on the lungs
25 that might just cause a lung injury rather than death.

1 Considering all this, Dr. Corrigan explained that she
2 told her hospital that OB/GYN physicians in Idaho are, quote,
3 "bracing for the impact of this law as if it is a large meteor
4 headed toward Idaho."
5 Now, it nearly goes without saying in the text of
6 EMTALA, the circumstances in which stabilizing treatment must be
7 offered are considerably broader. EMTALA is phrased in
8 probabilistic terms: When the absence of treatment is
9 reasonably expected to result in placing the health of a patient
10 in serious jeopardy, in serious impairment to bodily functions,
11 in serious dysfunction of any bodily organ or part.
12 The conditions described by Dr. Corrigan plainly
13 describe there being abortions that are necessary under EMTALA,
14 that are required as a matter of federal law that Idaho law
15 would set -- is poised to criminalize.
16 There is also, of course, a fairly common complication
17 of pregnancy, ectopic pregnancy, that is discussed in the
18 briefing.
19 Dr. Amelia Huntsberger in Sandpoint, Idaho, at Docket
20 86-4, explains that not every patient with an ectopic pregnancy
21 will die without treatment, which I take to mean that there are
22 circumstances in which it may be possible, theoretically, to
23 wait for a fallopian tube to rupture and for the fetal heartbeat
24 to stop before trying to clean up the internal bleeding and
25 organ damage.

1 Now, the legislature has argued that ectopic
2 pregnancy -- that treatment of an ectopic pregnancy is not
3 within the scope of the law. The State, notably, has not taken
4 that position.
5 And the legislature has not grappled with the
6 statutory text in the slightest in trying to explain to this
7 Court or to physicians why the treatment of an ectopic pregnancy
8 would not constitute criminal abortion under Idaho law.
9 As the Court indicated, with respect to obstacle
10 preemption, there are questions here about the chilling effect.
11 And one thing I haven't discussed yet is the very peculiar
12 manner in which the supposed exception of this law is
13 structured: That ordinarily if a state were to want to
14 criminalize abortion except in certain circumstances, it would
15 be the burden of the prosecutor to establish that those
16 circumstances were not met, and the prosecutor would have to
17 make that proof beyond a reasonable doubt.
18 Here, however, the presumption is flipped. Here, a
19 prima facie criminal violation is established any time an
20 abortion is performed within the state of Idaho. Full stop.
21 The only way for a physician to avoid becoming a felon and going
22 to jail for up to five years is by proving up the affirmative
23 defense and convincing the jury, on the physician's burden or on
24 the nurse's burden, by a preponderance of evidence that this
25 narrow affirmative defense has been satisfied.

1 It hardly seems necessary to point out that doctors
2 would avoid the risks of a criminal trial if at all possible.
3 But, again, we have declarations to demonstrate that that's the
4 case.
5 Dr. Kylie Cooper, an OB/GYN and maternal-fetal
6 medicine specialist at St. Luke's here in Boise, said in her
7 supplemental declaration, Docket 86-5, that as a physician who
8 is practicing in Idaho and through her personal interactions
9 with healthcare providers around the state, as well as through
10 her positions with ACOG, the American College of Obstetricians
11 and Gynecologists, the Idaho Perinatal Project Advisory Board,
12 and the Idaho Coalition for Safe Reproductive Healthcare,
13 providers' fear -- provider fear and unease is real and
14 widespread.
15 The State and the legislature don't have any response
16 to this. Indeed, the Attorney General's Office doesn't seem to
17 argue on this point at all. They don't dispute the chilling
18 effect.
19 The legislature insists that prosecutors would
20 exercise their discretion prudently. As a matter of law, that
21 simply doesn't matter. The Ninth Circuit held in *United States*
22 *vs. City of Arcata* that in that case, the City's promise of
23 self-restraint does not affect our consideration of the
24 ordinance's validity.
25 That's the case here. And I think that it is

1 transparently the case that submitting a declaration from one
2 county prosecutor in a state that has 43 elected county
3 prosecutors provides no comfort to the physicians and the
4 nurses -- excuse me -- of this state.
5 Because, as Dr. Huntsberger pointed out in her
6 declaration, the very nature of discretion is that different
7 people are going to exercise it differently.
8 And even if it were the case that all 43 county
9 prosecutors could attest to the fact that they didn't intend to
10 prosecute under these circumstances, Idaho law has a provision
11 under which a member of a grand jury can identify the commission
12 of an offense and that fellow jurors must thereafter investigate
13 the same. That's Idaho Code 19-1108.
14 Likewise, there is a citizen complaint provision
15 whereunder any individual within the state of Idaho can go to a
16 magistrate with a criminal complaint. Under those
17 circumstances, the magistrate doesn't appear to have discretion.
18 If the elements of the crime are satisfied, then the magistrate
19 has to endorse the complaint.
20 And even if these procedures were not sufficiently
21 troubling, there is the fact of the statute of limitations.
22 There is a five-year statute of limitations on felonies in
23 Idaho, which means even if today's prosecutors decided that they
24 were not inclined to prosecute these offenses, nothing would
25 prevent a future prosecutor, perhaps one elected after today's

1 date, from taking up abortions that happened during the interim.
2 So, Your Honor, the United States filed this action
3 because federal law contains a requirement. The requirement is
4 for emergency care to be offered under certain circumstances,
5 that federal law preempts contrary state laws. And the
6 preemption effect is particularly powerful here, where lives,
7 livelihood, and health are surely on the line.
8 The State's legal interpretation of its statute
9 doesn't measure up and isn't consistent with the interpretations
10 that the State offered to its own supreme court only a month
11 ago. And the factual circumstances demonstrate that the need
12 for judicial intervention is dire.
13 So I'll be happy to respond to any additional
14 questions the Court has or to respond after the State and
15 legislature have an opportunity to speak.
16 THE COURT: I may have more questions after. But
17 you're going to reserve the balance of your time?
18 MR. NETTER: I will, Your Honor. Thank you.
19 THE COURT: Very good. Thank you, Mr. Netter.
20 Mr. Church.
21 MR. CHURCH: Thank you very much, Your Honor.
22 THE COURT: While you're getting up there, I would
23 like you to respond to Mr. Netter's -- well, to the issue of
24 whether or not an ectopic pregnancy is a pregnancy.
25 Just looking at the plain language of the statute, I

1 know there has been an argument that it's not -- or at least
2 it's not an abortion to end an ectopic pregnancy, but the
3 "abortion" is defined as "terminating any clinically diagnosable
4 pregnancy," and "pregnancy" is defined as "having a developing
5 fetus in the body and commences with fertilization."
6 Isn't even an ectopic pregnancy a developing fetus
7 after fertilization? And why is that not kind of dispositive on
8 that issue?
9 I'm only asking that question now because that was
10 kind of the last point that Mr. Netter made, and it was on my
11 mind. Go ahead.
12 MR. CHURCH: Good morning again, Your Honor. May it
13 please the Court. Deputy Attorney General Brian Church on
14 behalf of the State of Idaho.
15 Let me begin by tackling the question you just asked,
16 Your Honor. And as the State, I am bound by what the
17 legislature has wrote with respect to what a definition is of an
18 abortion under Idaho Code 18-604(1).
19 Your Honor, it is our understanding that with respect
20 to an ectopic pregnancy, that that would be defined as a
21 pregnancy under law and that it would be direct with respect to
22 your question.
23 Now, in this case, Your Honor --
24 THE COURT: Just so we're clear, then, that
25 necessarily follows that if you end that pregnancy through an

1 abortion, through a termination of the developing fetus in the
2 fallopian tube, that that would be an abortion?
3 MR. CHURCH: Yes, Your Honor, again, based upon Idaho
4 Code 18-604(1).
5 THE COURT: And sub 11, which I think is the
6 definition of pregnancy.
7 MR. CHURCH: That would be correct, Your Honor. And
8 with respect to sub 1, which defines abortion, the State is
9 bound by the definition --
10 THE COURT: Okay.
11 MR. CHURCH: -- that has been provided, Your Honor.
12 THE COURT: Thank you for your candor. Go ahead.
13 MR. CHURCH: I appreciate that. Thank you very much,
14 Your Honor.
15 In this case, Your Honor, the United States asked this
16 Court to enjoin Idaho from enforcing Idaho Code Section 18-622
17 against any provider in every instance where 18-622 and the
18 Treatment Act may apply. This Court should deny the preliminary
19 injunction for four reasons.
20 First, the United States has not shown that every
21 abortion performed as a stabilizing treatment would conflict
22 with 18-622 and so has not met its burden for a facial
23 challenge.
24 Second --
25 THE COURT: All right. Well, let me -- you're going

1 to challenge my memory here. Go ahead and make the four points,
2 but I'm going to have questions about all of them, because the
3 whole issue of as applied or facial challenge, I don't
4 understand the United States to be arguing that the entire
5 statute is invalid, only that it's invalid when applied in an
6 emergency room setting where there are EMTALA obligations.
7 How does that become -- well, I will ask you, when you
8 finish your list -- so be prepared -- why that makes it a facial
9 application. And then the follow-up question is: Why does it
10 matter?
11 Go ahead. And you have to understand, I'm going to
12 have a lot of questions here. And I will try to ask them in a
13 way that does not disrupt the flow of your argument, but I can't
14 promise that. So go ahead.
15 MR. CHURCH: Your Honor, I appreciate the
16 interruption. And I appreciate the opportunity, on behalf of
17 the State, to answer the Court's questions.
18 As Your Honor has indicated, I would like to finish
19 the four points, and I will directly respond to your question
20 about the facial challenge.
21 The second reason, Your Honor, that this Court should
22 deny the injunctive relief is that the Treatment Act with its
23 savings provision, which is 1395dd(f), does not preempt Idaho
24 from imposing criminal consequences for a violation of 18-622,
25 as the savings provision allows each state law requirement to

1 stand unless it directly conflicts with the requirement in the
2 Treatment Act.
3 THE COURT: Yeah. That was my discussion with
4 Mr. Netter. And that's, I think, an issue he has to address.
5 So you will need to be prepared to address the Ninth Circuit's
6 take on that language, which I'm not sure I understand but I
7 have to follow.
8 So go ahead.
9 MR. CHURCH: I appreciate that, Your Honor.
10 The third reason why the Court should deny injunctive
11 relief in this case is that there is no direct conflict with a
12 Treatment Act requirement because Idaho chose to make an
13 exception to criminal liability and affirmative defense which
14 has the doctor assert a subjective good-faith medical judgment
15 as his or her defense.
16 THE COURT: And I will ask you, once you have
17 completed -- that it's not an exception; it is an affirmative
18 defense.
19 Do you agree with that?
20 MR. CHURCH: Well, Your Honor, it is an affirmative
21 defense, but it's also an exception to criminal liability. And
22 it's just the way in which the burden shifts, Your Honor.
23 As even Mr. Netter pointed out, under a typical
24 exception, which, like the fetal heartbeat, for instance, would
25 have, it would be the burden of a prosecutor.

1 THE COURT: To prove beyond a reasonable doubt that
2 the exception does not apply?
3 MR. CHURCH: That would be correct, Your Honor.
4 But, as we'll point out in just a moment, I'm not sure
5 that there is any material difference between an affirmative
6 defense which has the physician maintaining the burden and the
7 prosecutor maintaining a burden; each that proves an exception
8 to criminal liability, at least for preemption purposes,
9 Your Honor, and at least with respect to a direct conflict with
10 a Treatment Act requirement, which is what the savings provision
11 requires.
12 THE COURT: Okay.
13 MR. CHURCH: The fourth reason, Your Honor, why the
14 State of Idaho would ask this Court deny injunctive relief is
15 that even though the United States' declarants made clear that
16 they could determine when an abortion was necessary to preserve
17 the life of a pregnant woman, the United States has not shown
18 that doctors in all instances would be chilled by an alleged
19 conflict between 18-622 and the Treatment Act such that the
20 entire purpose of the Treatment Act would be nullified.
21 Your Honor, I understand you wanted me to first
22 address the question about the facial challenge, and I would
23 like to go ahead and go there now.
24 THE COURT: Yes.
25 MR. CHURCH: So, Your Honor, my understanding of the

1 United States' requested relief in this case is for a
2 preliminary injunction. I'm going to go to their filing of
3 their proposed order, which is at Docket 17-2.
4 The proposed order in this case, as I understand,
5 seeks an injunction of the State not only as with respect to the
6 United States itself but that would enjoin the State from
7 applying Idaho Code 18-622 to any abortion performed by any
8 physician or hospital within the state of Idaho.
9 And that would be the second full paragraph of the --
10 or the second further-ordered paragraph that is in that -- in
11 that docket.
12 And the reason why I point that out, Your Honor, is
13 because, as I understand the relief that's requested in this
14 case, it is relief that is beyond just the United States itself;
15 it's relief that goes to additional parties.
16 THE COURT: Well, Counsel, I wanted to -- well, I
17 checked the transcript to see if I heard you correctly. You are
18 saying that the State is requesting that 18-622 have no
19 application in any emergency room in the state of Idaho? Are
20 you saying that's the requested relief?
21 MR. CHURCH: No, Your Honor.
22 THE COURT: Okay. I misunderstood. Would you restate
23 that so I'm sure, so that we are clearly communicating here.
24 MR. CHURCH: Sure. I want to be clear on that, Your
25 Honor. Thank you.

1 THE COURT: Well, let me take a stab at the way I
2 understand the relief requested, which is that 18-622 would have
3 no application in any emergency room which has been provided
4 with Medicare funding and where EMTALA would require that an
5 abortion be performed. That's my understanding of what the
6 United States is asking.
7 MR. CHURCH: Let me add one caveat to that,
8 Your Honor.
9 I think, in addition to that, one of the things that's
10 being requested or as part of that request, Your Honor, is that
11 the State of Idaho not be allowed to either take criminal action
12 against or licensing action against any physician or hospital as
13 a result of an alleged conflict between 18-622 and the Treatment
14 Act.
15 So, Your Honor, the scope of relief is going beyond
16 just the United States here. It would also apply in
17 circumstances to persons who are not even parties to this
18 proceeding, namely, physicians and potentially hospitals as
19 well.
20 THE COURT: Are you arguing this as a standing issue?
21 MR. CHURCH: No, I'm not arguing this as a standing
22 issue, Your Honor. I'm arguing this as part of why this is a
23 facial challenge.
24 Because some of the case law -- the *John Doe* case that
25 we cited, for instance -- I think helps make this point that

1 some of the relief here is going beyond just a particular
2 abortion that maybe the United States would be raising to the
3 State of Idaho.
4 Recall, Your Honor, that this pre-enforcement
5 challenge is going at every single time an abortion may be
6 provided as stabilizing treatment under the Treatment Act, and
7 the United States is attempting to block the enforcement of
8 18-622 in every single instance.
9 And for that reason, Your Honor, we believe that this
10 is a facial attack that the United States bears the burden under
11 the *Salerno* test of showing that there are zero instances where
12 18-622 can be applied with the Treatment Act.
13 And, Your Honor, we believe clearly -- and as the
14 original declarations seem to indicate -- the doctors in this
15 case are able to determine what is necessary to preserve the
16 life of a woman or necessary to prevent the death of a pregnant
17 woman, which is what 18-622 authorizes.
18 So we are not seeing a direct conflict in those
19 instances, Your Honor. As such, that would defeat the facial
20 challenge in this case, because there are certainly instances
21 where Idaho Code 18-622 can be applied where there is an
22 abortion provided as stabilizing treatment under the Treatment
23 Act.
24 As such, because it's a facial challenge, that is the
25 key point, Your Honor, is that they haven't met their burden of

1 showing that there is zero instances where those two acts can be
2 applied together.
3 Now, Your Honor did ask about our position on
4 life-threatening versus necessary to prevent the death or
5 necessary to preserve the life of a woman. And I do want to
6 address that, Your Honor.
7 And I guess one point is -- that I would note is that
8 our understanding of what the language means with respect to
9 Idaho Code 18-622 is that it's consistent with, I think, the
10 general purpose of the Hyde Amendment, the current Hyde
11 Amendment that governs the federal trust funds that are provided
12 for Medicare purposes.
13 And this is from Public Law 117-103. It's one of the
14 laws cited by the United States. And I am specifically reading
15 from 136 Statutes at Large 496. And this is Section 507.
16 It explains that the limitations established in the
17 preceding section, which as I understand it generally prohibit
18 the funds -- federal funds from going to abortion, do not apply
19 to an abortion, one, if the pregnancy is the result of an act of
20 rape or incest -- which is covered as part of 18-622,
21 Your Honor -- or, second, in the case where a woman suffers from
22 a physical disorder, physical injury, or physical illness,
23 including a life-endangering physical condition caused by or
24 arising from the pregnancy itself that would, as certified by a
25 physician, place the woman in danger of death unless an abortion

1 is performed.

2 THE COURT: I'm not sure I completely understand why

3 that statute is relevant when we have -- that's a federal

4 statute. And is it directly applicable to the EMTALA

5 obligations?

6 MR. CHURCH: Well, it's not directly applicable, Your

7 Honor, but it's also -- it's consistent with -- we are offering

8 it solely to show that our interpretation is consistent with

9 the --

10 THE COURT: Well, you're saying that the Idaho

11 legislature, when they said that the abortion was necessary to

12 avoid the death of the patient, that they were really thinking

13 what Congress said when they are dealing with it in a totally

14 different context. I'm not sure I understand how that flows.

15 MR. CHURCH: Well, let me make two points with respect

16 to that, Your Honor. I think the first point, you said

17 "necessary to avoid the death of the woman." That's not the

18 language of the statute.

19 THE COURT: Well, I was paraphrasing. But the word

20 "necessary" is there, and that's the operative term.

21 MR. CHURCH: That is correct; the word "necessary" is

22 there. And it's necessary to prevent the death of the pregnant

23 woman.

24 I offered the example of the current Hyde Amendment

25 simply to show that our interpretation of Idaho Code 18-622

1 appears to be consistent with what the Hyde Amendment provides
2 as a matter of federal law.
3 It's not to shed light on exactly what 18-622's terms
4 mean. That would be a question of law, as Mr. Netter pointed
5 out, for this Court or, really, the Idaho Supreme Court to
6 determine.
7 And, Your Honor, with respect to that, you know,
8 that's also why we could have an as-applied challenge as part of
9 a prosecution. If there truly is a prosecution, Your Honor, of
10 a physician, that physician could argue that the abortion was,
11 in his or her good-faith medical judgment -- which is a
12 subjective standard -- that the abortion was necessary to
13 prevent the death of a woman.
14 That is a subjective standard, and the Court would be
15 well -- in a criminal prosecution would be well capable of
16 handling determining whether the -- whether the physician has
17 made that showing and made -- made clear that the affirmative
18 defense would apply.
19 THE COURT: Let me ask -- and this came up from
20 Mr. Netter's suggestion that, within the last few weeks, your
21 office has appeared before the Idaho Supreme Court and argued,
22 to avoid a suggestion of ambiguity, that the statute clearly
23 requires that the procedure of abortion was essential to prevent
24 the death of a pregnant woman.
25 Essential is different than a risk.

1 Again, I don't know if you argued that or not or if
2 someone else in your office did, but I'm sure your office wants
3 to be consistent.
4 Could you kind of just explain why that should not be
5 troublesome to the Court.
6 MR. CHURCH: Sure. That should not be troublesome to
7 the Court for a couple reasons.
8 And first, let me point -- I agree with Your Honor
9 that there is nowhere in the statute Idaho Code 18-622 that the
10 term "risk" is used with respect to -- that the abortion is
11 necessary to prevent a risk of death of the pregnant woman.
12 Instead, it's abortion is necessary to prevent the pregnant
13 death of a woman.
14 Your Honor, I believe in that case, Mr. Netter is
15 citing to language that is also citing from Black's Law
16 Dictionary. I don't see any meaningful difference in the
17 position that the State is taking here today with respect to its
18 understanding of 18-622 and the position that it has taken
19 before the Idaho Supreme Court.
20 You're right, Your Honor, it's a different attorney
21 with that case. But I understand --
22 THE COURT: You're not throwing someone under the bus,
23 are you?
24 MR. CHURCH: I am not throwing someone under the bus,
25 Your Honor, because our position, I believe, is consistent

1 between the two cases. And even then, Your Honor, you know,
2 this is a question of law for this Court if it decides it must
3 interpret Idaho Code 18-622.
4 Again, the important facet from the State's
5 perspective in this case, Your Honor, is that the United States
6 has not shown in all instances that there is a direct conflict
7 between Idaho Code 18-622 and the Treatment Act. Because there
8 are certainly cases where the abortion was necessary to prevent
9 the death of the pregnant woman, as some of the declarations
10 from the United States' declarants in their original submission
11 made clear.
12 Now, one -- the second point I had, Your Honor, that I
13 did want to move on to and address was in the United States'
14 response brief, they appeared to make an argument that the State
15 of Idaho was categorically preempted from exercising either
16 civil regulatory or civil sanctioning or criminal sanctioning
17 authority with respect to any stabilizing or any type of
18 treatment that would be offered as a stabilizing treatment. And
19 that's page 19 of their reply brief that I'm looking at.
20 I would note that if their argument is that there's a
21 categorical rule prohibiting some criminal prohibition of
22 manners of treatment, such as abortion, first, that that would
23 be inconsistent with the savings provision in 1395dd(f). Recall
24 that 1395dd(f) allows every state law requirement to stand
25 unless that state law requirement directly conflicts with a

1 requirement in EMTALA or the Treatment Act.

2 Now, with respect to that, Your Honor, my note would
3 be that the case law has established that state malpractice
4 actions, for instance, have been authorized against physicians
5 or providers. Moreover, even the act itself provides for civil
6 regulatory penalty --

7 THE COURT: Why would a malpractice action create a
8 conflict with EMTALA?

9 MR. CHURCH: And that's my point. It does not create
10 a conflict.

11 THE COURT: Here, their argument is that there is a
12 conflict. So why is that apropos to what we're discussing here?

13 MR. CHURCH: Well, it's apropos because we are
14 contending that there is no conflict in allowing the State to
15 even have a criminal prohibition in the first place.

16 My understanding is that the United States has raised
17 a categorical argument.

18 THE COURT: Well, there is no conflict if the criminal
19 prohibition provides an exception that would fall and satisfy
20 the three categories of EMTALA where medical care is necessary
21 even if it includes an abortion.

22 That's the whole point of this, is whether there is no
23 exception for injury short of death. And it's stated as an
24 affirmative defense in which the burden is on the doctor to
25 prove by a preponderance of the evidence the existence of the

1 condition -- the circumstance rather than the burden being upon
2 the State to prove beyond a reasonable doubt that it does not
3 exist.
4 And I can tell you, having presided over hundreds of
5 criminal trials, that is a huge difference. So...
6 MR. CHURCH: Well, and I appreciate what Your Honor
7 has recognized. And I am just responding to one argument that
8 was made in the United States brief.
9 But you're right. The United States also contends, as
10 we understand it, that 18-622 -- and this is at pages 7 to 8 of
11 their brief -- that 18-622 is problematic because it places an
12 affirmative defense on the physician and places the burden on
13 the physician to prove that affirmative defense.
14 Now, I did want to make one note is that, as part of
15 their briefing, the United States cites to the Fetal Heartbeat
16 Act as an example of a law that allows exceptions. And my
17 understanding of the United States' brief is that, under their
18 envisioning, the Fetal Heartbeat Act itself is not in direct
19 conflict with EMTALA or the Treatment Act simply because it has
20 an exception within it.
21 Now, one additional aside I should note for Your Honor
22 is that the Fetal Heartbeat Act, as of Friday, August 19, did go
23 live and is effective. And it does currently govern physicians
24 within the state. And so physicians within the state are bound
25 by 18-8804 and 18-8805 -- excuse me, Your Honor -- with respect

1 to the criminal prohibitions that are within 18-8805.
2 As the Court well knows, though, under 18-622 --
3 THE COURT: Are you suggesting that the fetal
4 heartbeat law has superseded the criminal abortion statute?
5 MR. CHURCH: No, Your Honor, but let me clarify that.
6 So under 18-8805 and I believe it's sub 4, 18-8805 was
7 presumed to go in effect first and has now gone into effect
8 first. When 18-622 became enforceable, at least the criminal
9 provisions of 18-622 became enforceable, that statute, 18-8805,
10 provided that the criminal prohibitions if 18-622 were
11 enforceable would supersede 18-8805's, or the Fetal Heartbeat
12 Act's, criminal prohibitions.
13 Again, right now, as we stand today, Your Honor, the
14 Fetal Heartbeat Act is effective and it is active within the
15 state of Idaho.
16 THE COURT: But not in criminal prosecutions?
17 MR. CHURCH: It is effective with respect to criminal
18 prosecutions, Your Honor.
19 THE COURT: I thought you just said that the 18-622
20 said that any contrary provision has to give way to its
21 provisions. Did I --
22 MR. CHURCH: When 18-622 is enforceable, Your Honor.
23 18-622 is not effective yet and is not enforceable yet.
24 THE COURT: Well, as of Thursday, then it will. Is
25 that what you're saying?

1 MR. CHURCH: As of Thursday, assuming the Court does
2 not enjoin it, it certainly will be enforceable, Your Honor.
3 THE COURT: Well, I certainly won't enjoin anything
4 more than what the United States has asked, which is enjoin
5 enforcement in the context where EMTALA would require medical
6 treatment.
7 MR. CHURCH: Correct, Your Honor. And again, if
8 18-622 is not enforceable in those circumstances, then, by the
9 terms of 18-8805(4), my understanding is that those criminal
10 provisions would be enforceable, the Fetal Heartbeat Act
11 provisions would be enforceable if 18-622 is not enforceable.
12 But the one thing I think Your Honor -- and Your Honor
13 has hit upon it as well -- is that the difference in this case
14 that's alleged is that there is a difference between Idaho's
15 chosen mechanism of allowing an affirmative defense and allowing
16 a doctor to show good-faith proof that it was a good-faith
17 medical judgment based on the facts known to the physician at
18 or -- at the time that the doctor makes the decision, that the
19 abortion was necessary to prevent the death of a pregnant woman.
20 Now, under -- in a typical exception case where the
21 prosecutor would bear the burden -- and my understanding with
22 respect to 18-8805 and 18-8804 is that it is based upon an
23 objective standard of whether the -- there was an emergency
24 medical condition, for instance, under those statutes and that
25 it uses an objective standard.

1 Now, what I don't understand, Your Honor -- and I
2 think this is the point of disagreement between the State and
3 the federal government -- is this: The United States appears to
4 take no issue or have no issue with 18-8804 and 18-8805, the
5 Fetal Heartbeat Act -- which provide for an exception process
6 but still provide for criminal prosecution -- but takes issue
7 and shows -- and says that there is a direct conflict when Idaho
8 has chosen in 18-622 to impose an affirmative defense structure.
9 There is no good basis, in our -- in the State's view,
10 to view the difference in the burden of proof or the subjective
11 versus objective standard as being in direct conflict with the
12 Treatment Act.
13 Now, the one case that the United States cites in its
14 reply brief is *Arrington*. And I've had a chance to look at
15 *Arrington*. I understand *Arrington* to be the Ninth Circuit
16 reviewing an agency's -- I believe Health and Human Services'
17 review of a hospital's ambulance diversion policy. It doesn't
18 say anything about criminal liability or that the State is going
19 to be preempted from having a criminal liability that is
20 escapable through an affirmative defense.
21 There is simply no requirement, Your Honor, in the
22 Treatment Act that, in our view, would be a direct conflict here
23 with respect to a requirement of the Treatment Act and a
24 requirement in 18-622.
25 Now, Your Honor had asked about the direct conflict

1 and what that means with respect to the Treatment Act. And,
2 Your Honor, we're bound for these proceedings by the
3 Ninth Circuit's decision in *Draper*, which, as Mr. Netter
4 indicated, determined that the direct conflict means that there
5 would either be -- that it would be physically impossible to
6 comply with both Idaho Code 18-622 in this case and with the
7 Treatment Act, or it would apply in those situations when the
8 entire Act's purpose would be, as we pointed out in our
9 briefing, effectively nullified, is the language from the
10 Ninth Circuit that's used.
11 And in this case, Your Honor, we certainly don't
12 believe that the standard that the State of Idaho has placed
13 upon physicians to prove an affirmative defense is one that
14 stands as a -- as essentially a nullification of the entire
15 purposes of the anti-dumping Treatment Act.
16 Now, the last thing I wanted to just touch upon,
17 Your Honor, was with respect to the chilling argument. And
18 contrary to Mr. Netter's representation, we certainly did
19 challenge the assertion that there would be chilling in this
20 case. Let me make a couple points with respect to the chilling.
21 First, we understood the declarants in their original
22 declarations to make perfectly clear that they could determine
23 when an abortion was necessary to save the life of a mother.
24 THE COURT: Well, the declarations that you submitted
25 didn't use that terminology. Typically, they indicated that

1 these were life-threatening and did not, I don't think,
2 directly -- or did they? If they did and you can point that
3 out, I'll stand corrected.
4 But that was one of the concerns I had, is that the
5 medical declarations from healthcare providers that you
6 submitted consistently referred to these as being clearly
7 life-threatening and, therefore, falling within the affirmative
8 defense.
9 MR. CHURCH: So just as one example, Your Honor, we
10 only submitted one declaration from a healthcare provider on
11 behalf of the State. This was at 66-1, declaration --
12 THE COURT: Perhaps it was submitted by the
13 intervenor --
14 MR. CHURCH: The legislature.
15 THE COURT: But I'll let Mr. Stewart respond to that.
16 MR. CHURCH: I do want to make one clarification,
17 though, Your Honor.
18 We did point out that -- this would be from the
19 declaration of Kraig White, paragraph 4, and this is at page 4
20 as well. He, for instance, says: "It would be my good faith
21 medical opinion that termination of the pregnancy was necessary
22 to save the life of the pregnant woman."
23 So I believe that's consistent with --
24 THE COURT: Okay. That's correct. That absolutely is
25 the language at issue here.

1 MR. CHURCH: But we also understood, and my point,
2 Your Honor, was that the United States -- the federal
3 government's declarants certainly knew and made statements that
4 they were able to determine that a medical abortion was
5 necessary to save the life of the mother, which is the call that
6 18-622 imposes upon physicians.
7 Now, with respect to the chilling argument, our
8 understanding of the chilling argument is that physicians -- the
9 United States asserts that physicians would feel chilled simply
10 because there is an apparent conflict or an alleged conflict --
11 excuse me -- between 18-622 and the Treatment Act.
12 But we must remember that 18-622 applies in all
13 contexts, not just in the Treatment Act context, but any facet
14 of a physician's practice, you know, including practices outside
15 of the Treatment Act.
16 And so making that decision that is placed upon
17 physicians to determine whether an abortion is necessary to
18 preserve the life of the pregnant woman is a call that they are
19 going to have to make not just at the emergency room but also in
20 their normal practice to the extent they believe an abortion is
21 necessary in their good faith medical belief and judgment to
22 preserve the life of the pregnant mother.
23 We would also note, at least for the chilling
24 purposes, Your Honor, that there is just no direct conflict with
25 any particular requirement of the Treatment Act.

1 THE COURT: Well, let me ask a question about that.
2 And you are about out of the time that you have agreed was a
3 portion of time. I'm going to actually have a question or two
4 to follow up, so I think I will just turn your clock off while I
5 ask those questions.
6 MR. CHURCH: I appreciate that, Your Honor.
7 THE COURT: You might not appreciate it when I'm done,
8 but we'll see. I hope your answers will be enlightening because
9 I've got a question that I think points out, at least in my
10 mind, the challenge in how we apply this.
11 How do we get around the fact that the affirmative
12 defense only deals with conducting an abortion necessary to
13 prevent the death of the patient when the EMTALA talks about
14 having injury to organs adversely affecting -- you know, serious
15 impact upon health? I can't, off the top of my tongue, give you
16 those three elements.
17 But isn't there just a total impossibility preemption
18 because there is just complete conflict because there is no
19 exception for anything short of an abortion necessary to prevent
20 the death of the patient when EMTALA clearly says you have to be
21 concerned about their health as well?
22 MR. CHURCH: Well, let me make two points in response
23 to that, Your Honor.
24 First, I do want to look at the statutory text of the
25 Treatment Act just to make sure we are on the same page as far

1 as the terms.

2 And Your Honor cited, I believe, first, the definition

3 of "emergency medical condition," which, as we have all agreed,

4 as provided by the text of the statute to mean "a medical

5 condition manifesting itself by acute symptoms of sufficient

6 severity, including severe pain, such that the absence of

7 immediate medical attention could reasonably be expected to

8 result in placing the health of the individual or, with respect

9 to a pregnant woman, the health of the woman or her unborn child

10 in serious jeopardy, serious impairment to bodily functions, or

11 serious dysfunction of any bodily organ or part." Or there is

12 another provision that applies with respect to a pregnant woman

13 who is having contractions.

14 THE COURT: Yeah, right. So those were the three.

15 That's exactly the three conditions under EMTALA that I can

16 never rattle off, but you did a nice job of doing that.

17 MR. CHURCH: But I want to offer one more point,

18 Your Honor, with respect to that.

19 When a patient is -- when a person goes to the

20 emergency room, has a screening, and that screening determines

21 that there is an emergency medical condition -- which is what we

22 have been just discussing -- that is then the springboard or it

23 starts the process that's required by 49 U.S.C. 1395dd(b)(1) --

24 well, correction -- well, I'm sorry, Your Honor. I apologize.

25 It's within sub (b) sub (1) that the -- once there is an

1 emergency medical condition that has been found, it is then up
2 to the hospital, "within the staff and facilities available at
3 the hospital, for such further medical examination and such
4 treatment as may be required to stabilize the medical
5 condition."
6 And the reason why I bring that up, Your Honor, is I
7 want to make sure we're clear on the definition of stabilizing
8 treatment, because stabilizing treatment under provision (e)
9 sub -- it's going to be (e) sub (3) is treatment that is
10 "necessary to assure, within reasonable medical probability,
11 that no material deterioration of the condition is likely to
12 result from or occur during the transfer of the individual from
13 a facility."
14 So I want to make sure, Your Honor, that, you know,
15 stabilizing treatment is not necessarily a cure of an emergency
16 medical condition, Your Honor. It is simply treatment that's
17 necessary to assure that there is no material deterioration
18 within a reasonable medical probability of whatever condition is
19 there.
20 Now, Your Honor asked about what happens where an
21 abortion is -- a provider determines that abortion is necessary
22 not to prevent the death of a woman, but it would be necessary
23 as some form of stabilizing treatment.
24 THE COURT: Well, not -- it would be necessary to
25 protect her health, to protect her organs, to protect, you know,

1 those three standards that EMTALA imposes. That's where my
2 concern is.
3 In fact, let me -- I'm going to ask -- I've asked
4 Ms. Smith to stop the clock for a minute here. I don't want to
5 take up Mr. Stewart's time. I'm hopeful he appreciates that.
6 But here, you know, I've tried to think in my mind
7 what kind of portrays where the conflict is. And I thought
8 about, you know, maybe it's being someone who wishes they had
9 been a law school professor, and so I came up with a
10 hypothetical that law professors like to use to try to make
11 points. And I'll throw that at you, and you can tell me how you
12 would respond.
13 Let's say you're an attorney with a client who is an
14 ER doctor. She calls somewhat in a frantic state because she
15 has got a patient that she is now treating in a very difficult
16 situation; let's say it's preeclampsia. They have tried to
17 control it medically and have been unable to, and the accepted
18 medical practice at that point is an abortion.
19 Basically, her blood pressure is completely out of
20 control; and in her experience, if the abortion is not
21 performed, there is at least a 50/50 likelihood that she will
22 die.
23 She also indicates that she is completely risk averse
24 and is not willing to take any chance that she will be
25 prosecuted even though that she might be able to succeed on an

1 affirmative defense.

2 So, as her attorney, do you advise her that she can

3 perform the abortion under the statute without any risk of

4 prosecution?

5 MR. CHURCH: Well, Your Honor, I appreciate the

6 question.

7 And so with respect to that, just to make sure we're

8 clear, that this would be a situation covered by the Treatment

9 Act to begin with.

10 THE COURT: Yes. I should have predicated. Yes,

11 absolutely.

12 MR. CHURCH: So with respect to that, Your Honor, and

13 the current version of Idaho Code 18-622, I, as the lawyer,

14 would advise that -- I would ask questions: Is this necessary

15 to prevent the death of a pregnant woman?

16 THE COURT: Well, she said it's at least 50 percent.

17 It's a 50/50 proposition.

18 MR. CHURCH: Well, Your Honor, but I would -- as the

19 lawyer, I would point back to the fact that 18-622 contains no

20 risk or no 50/50 risk requirement or no requirement that the

21 death be imminent or some other temporal requirement. It simply

22 applies where the abortion is necessary to save the life of the

23 pregnant mother.

24 THE COURT: And she says: I can't answer that; I can

25 just tell you it's 50/50.

1 MR. CHURCH: Well, then that physician, well, one,
2 could also consider consulting not only with me but with other
3 physicians, or --
4 THE COURT: She has got a patient that is in critical
5 medical condition; she has to make a decision immediately as to
6 what to do.
7 MR. CHURCH: Well, Your Honor, you know, as the
8 attorney for the hospital, you can only advise on what the law
9 is. And the law says, under 18-622, that she needs to determine
10 in her good faith medical judgment whether the abortion is
11 necessary to preserve the life of the pregnant mother.
12 THE COURT: And if she gets it wrong, she is
13 prosecuted, charged, arrested, and has a chance to argue and
14 prove to the jury that her judgment was right; the 50/50 is
15 enough to say that it was necessary to prevent her death? Is
16 that --
17 MR. CHURCH: I do want to quibble with one last aspect
18 of your point there, Your Honor.
19 Remember, under 18-622, the affirmative defense that
20 is offered is based on the physician's subjective good faith
21 medical judgment. If the physician can testify and show that it
22 was within her good faith medical judgment to perform the
23 abortion and that the abortion was necessary to save the life of
24 the pregnant woman, then that falls within the affirmative
25 defense of Idaho Code 18-622.

1 THE COURT: And what if she says, you know, they think
2 they can control it, but there still is a 5 percent chance that
3 she will die. Does that change your advice to the doctor?
4 MR. CHURCH: No, Your Honor. Because, again, there is
5 no -- not at least from the State's perspective, there is no
6 probability or risk that is part of 18-622. 18-622 just
7 requires that the physician make that determination of whether
8 it's necessary to preserve the life of the pregnant woman.
9 THE COURT: All right. Well, then the same
10 hypothetical, but she indicates that if the abortion is not
11 performed, the patient will not die, but there is a 90 percent
12 chance she will suffer a stroke, have permanent damage to her
13 vital organs, such as her heart, her liver, or her kidneys.
14 What's your answer then?
15 MR. CHURCH: Well, Your Honor, it's the same answer in
16 that you would have -- under Idaho law, the affirmative defense
17 arises under 18-622 when the abortion is necessary to prevent
18 the death of the pregnant woman.
19 THE COURT: So you would tell her she cannot perform
20 that abortion, or she would be facing criminal liability?
21 MR. CHURCH: Your Honor, I would just be advising as
22 to what the statute says, Your Honor.
23 But I would note for purposes of this case,
24 Your Honor, that because this is a facial challenge, there are
25 still circumstances where, you know, 18-622 and the Treatment

1 Act can be applied. And that's a reason why we should deny the
2 United States' requested preliminary injunction relief in this
3 case.
4 THE COURT: Okay. So basically, as an attorney, you'd
5 simply tell the doctor, your client: This is what the statute
6 says, and I can't tell you whether you will be prosecuted or
7 not, but the risk is that this is what the statute provides?
8 And I assume you would agree that in the last part of
9 my hypothetical where there is no risk of death, but there is a
10 substantial risk of serious impact upon her health -- organs
11 failing, permanent damage to those organs, maybe a stroke --
12 that in that situation, the statute would not apply and would
13 not provide an affirmative defense.
14 MR. CHURCH: Your Honor, I'm only bound by what 18-622
15 provides.
16 THE COURT: Okay. Well, that's why I'm asking. Do
17 you agree that 18-622 would not provide an affirmative defense
18 in that situation?
19 MR. CHURCH: If the -- if the physician cannot testify
20 in her good faith medical belief that she believed the abortion
21 was necessary to preserve or prevent the death of the pregnant
22 woman, then the affirmative defense would be inapplicable in
23 that case, Your Honor.
24 THE COURT: All right. And she would be subject to
25 criminal prosecution and face a minimum two years in prison?

1 MR. CHURCH: Subject to what I have just said, yes,
2 Your Honor.
3 THE COURT: Okay. All right. Thank you.
4 Anything else? I will let you make a few parting
5 shots before we hear from Mr. Stewart, if there is anything else
6 you want to add.
7 Counsel, I know the hypothetical -- I remember from
8 law school that we sometimes think that professors are being
9 unfair, but usually they are doing it to try to point out kind
10 of where the cutting edge is.
11 And that's the reason I did that, is to try to see how
12 a real-life attorney dealing with a real-life doctor dealing
13 with a real-life pregnant patient, how they are to confront the
14 statute in an emergency room setting. And that's why I asked
15 the questions that way.
16 You gave a very lawyerly response, which is: This is
17 what the statute provides and wouldn't provide guidance beyond
18 that.
19 But is that troublesome in terms of EMTALA compliance?
20 MR. CHURCH: I don't think so, Your Honor. Because,
21 again, I'm not certain that there is a direct conflict here that
22 is presented.
23 THE COURT: Even in the context where it's not
24 life-threatening?
25 MR. CHURCH: Well, even if there could be a conflict,

1 Your Honor, again, in the State's position, this is a facial
2 challenge.
3 THE COURT: All right.
4 MR. CHURCH: And we would have to show -- the
5 United States would have to show that in all instances, 18-622
6 conflicts with the Treatment Act.
7 Our position is they clearly haven't shown that,
8 Your Honor. And for these reasons, we would ask that you deny
9 preliminary injunctive relief requested by the United States.
10 THE COURT: Well, thank you.
11 MR. CHURCH: Thank you, Your Honor.
12 THE COURT: Thank you, Mr. Church.
13 Mr. Stewart.
14 MR. STEWART: Your Honor, Monte Stewart along with
15 Daniel Bower representing the Idaho legislature.
16 Here is my answer to your hypothetical: That doctor
17 calls me from the emergency room or, more accurately, from an
18 extension of the emergency room, which would be up in labor and
19 delivery, which is where these emergencies really do play out.
20 And, yes, EMTALA does apply in labor and delivery;
21 it's not limited physically to the emergency room.
22 That doctor calls me and gives me the 50/50
23 hypothetical. I tell her: You go right ahead, and you use your
24 best medical judgment, and you can do so without fear of
25 prosecution.

1 Now, I can do that and put my legal malpractice
2 insurance policy on the line and do so without the slightest
3 heartburn or without ever second-guessing myself.
4 Because in the real world, in the real world -- and
5 I'm speaking to you as someone who has prosecuted cases in state
6 court and as someone who, as an employee of the United States
7 Department of Justice, as the United States Attorney for the
8 District of Nevada, has prosecuted cases and knows how
9 prosecutors think: In the real world, there will not be a
10 prosecution. And Grant Loebs certainly backs me up.
11 Now, you then try to -- you then moved to make the
12 hypothetical more challenging where you eliminated the risk of
13 death. And you, I think, were trying to use some language from
14 EMTALA itself, from the definition of "emergency medical
15 condition" -- "serious impairment to bodily functions, or
16 serious dysfunction of any bodily organ or part."
17 Now, subpart (2) and subpart (3) -- I think I can
18 help. And this is going to help through the remainder of the
19 time you give me. May -- with the leave of the Court, may
20 Mr. Bower pass out a packet to Court and counsel, law clerks, if
21 that's okay, with just a few documents in it?
22 THE COURT: What is it you want the Court to look at?
23 MR. STEWART: The first document is actually the
24 Government's proposed preliminary injunction order. The second
25 one is the page from EMTALA that I am referring to. And the

1 third document is an exercise I went through regarding the
2 proper scope of any injunction if you decided to go in that
3 direction.
4 And, of course, the legislature believes the only
5 proper order is motion denied, but I think it's helpful in this
6 factual context to address that.
7 THE COURT: Why don't you put that on the evidence
8 presenter.
9 MR. STEWART: What's that?
10 THE COURT: If you could just put that on the evidence
11 presenter, it might be easier. We could possibly even -- I
12 don't know if we can bring it on for those in the audience,
13 but...
14 MR. STEWART: Can you see this or just the audience?
15 THE COURT: I'm supposed to be able to see it.
16 Well, all right. Yeah, I can now. It's up on my
17 screen. I don't know if we are able to show it to the --
18 MR. STEWART: Given my age, I'm low-tech. That's why
19 I brought paper copies for everyone.
20 THE COURT: I am not low-tech, and I prefer -- okay.
21 I think we have got it. Go ahead.
22 MR. STEWART: Okay. Well, if you'll see here, subpart
23 (2) and subpart (3) are the ones I just read to you. And that's
24 what I heard you saying --
25 THE COURT: That's not precisely --

1 MR. STEWART: -- in that second hypothetical. Is that
2 correct?
3 THE COURT: Well, I was not trying to capture it
4 precisely, but that was the point.
5 MR. STEWART: But the general idea, yes.
6 I would give the same answer with the same absence of
7 any heartburn.
8 THE COURT: So you are saying there is no risk of
9 prosecution --
10 MR. STEWART: Because there is another affirmative
11 defense in the real world. And that is assuming -- and I'm not
12 conceding anything -- you have limited me to talk about the
13 actual conflict which is the fact-intense issue here. In
14 talking only about that, I am honoring your directive to me.
15 THE COURT: Okay. Well, I think what you're saying is
16 that prosecutors will not actually prosecute under these
17 circumstances.
18 MR. STEWART: Right, because there is an affirmative
19 defense under the Government's own position --
20 THE COURT: Just a moment. Just a moment,
21 Mr. Stewart.
22 But there is not an affirmative defense as to the
23 three categories that we listed here, because the statute
24 doesn't provide an affirmative defense where it is just
25 health-threatening as opposed to necessary to prevent the death

1 of the mother.
2 MR. STEWART: Yes. 622 doesn't provide it, but EMTALA
3 does.
4 THE COURT: But that's the point, is EMTALA is in
5 conflict with -- or at least the Government is arguing that
6 EMTALA is in conflict with a federal statute which criminalizes
7 providing an abortion as a medical treatment if it is not
8 necessary to preserve the mother's life.
9 MR. STEWART: Exactly right.
10 Your Honor, let me step back and tell you that there
11 is a gulf between Mr. Netter and Mr. Stewart. Mr. Netter's
12 approach is highly conceptual, highly textual, highly abstract.
13 Mr. Stewart's approach is real life, real world, and practical.
14 THE COURT: Well, isn't real world -- I noted that
15 Mr. Netter referred to the comment made during the debates that
16 led to the adoption of the Idaho abortion statute in which an
17 effort was made to apparently include some protection for the
18 situation where the pregnant patient's health is at risk.
19 And the response was: Well, in that situation, the
20 right of the fetus should be primary.
21 Are you saying there are no prosecutors out of 44
22 counties in the state of Idaho that might not take that same
23 position?
24 MR. STEWART: Let me take the easiest case first.
25 Idaho is capable of many things, but it is not capable

1 of producing now or in the future a prosecuting attorney stupid
2 enough to prosecute an ectopic pregnancy case. The first thing
3 the doctor --
4 THE COURT: I didn't ask about an ectopic
5 specifically.
6 Just generally, given the attitude or the expression
7 of legislative intent which Mr. Netter referenced during his
8 oral argument, are you saying there is no prosecutor, in the 44
9 counties in the state of Idaho, who would take the position that
10 where it is only necessary to protect the health of the
11 mother -- I keep using the word "mother" -- health of the
12 pregnant patient, that should give way to the rights of the
13 unborn fetus?
14 MR. STEWART: The answer to that, Your Honor, is that
15 this legislation is designed to balance this state's
16 determination of the moral value of the preborn child on one
17 hand and the often weighty, weighty and even heart-wrenching
18 interests of the mother -- I won't hesitate to use the
19 word -- on the other hand. And this is where, in the exercise
20 of its constitutional right, the State of Idaho has drawn the
21 line.
22 What I'm trying to get across here, Your Honor --
23 because you're being asked to issue an injunction that carves
24 back against Idaho's judgment and to do so on the basis of one
25 federal statute, EMTALA. And we have talked about the conflict.

1 It is a fact-intensive conflict. I would like to point out
2 something extremely important, the single-most important thing I
3 can say to you right now in the time given me.
4 If you will look at the EMTALA language that's up on
5 the screen, you will see there is a subpart (1): "Placing the
6 health of the individual, or with respect to a pregnant woman,
7 the health of the woman or her unborn child in serious
8 jeopardy."
9 There is congressional language expressing a
10 congressional intent to protect and preserve the mother and the
11 child equally -- not one above the other, equally.
12 Why I have that in yellow and why this is the most
13 important thing I can tell you is because of the language the
14 Department of Justice wants you to use in any preliminary
15 injunction order.
16 They have used -- and this is the first document in
17 the packet. They have used -- after distorting the language of
18 subpart (1), they have used the subpart (1) language in the
19 proposed order. They even preserve the subpart (1) numeral, but
20 they don't quote it truthfully and fully and honestly, "placing
21 the health of a pregnant patient in serious jeopardy."
22 In other words, Your Honor, please, they have taken
23 congressional language, the purpose -- the clear meaning of
24 which, the clear purpose and intent of which is to protect the
25 unborn child from serious injury, serious jeopardy, serious

1 health problem. And they are writing that language after they
2 have taken out any reference which they never gave you anywhere
3 in their papers -- any reference to the "unborn child." They
4 are using that language --
5 THE COURT: Just a moment, Mr. Stewart. Just a
6 moment.
7 The conflict here is between a state statute
8 permitting an abortion -- excuse me -- criminalizing an abortion
9 even where the abortion would be necessary to preserve the
10 health and ensure no injury to -- permanent injury to organs,
11 et cetera. How or why should the requested relief in any way
12 reflect a concern for the health of the unborn fetus? Because
13 we're talking about an abortion where the choice has been made
14 where there is no balancing at that point.
15 MR. STEWART: Because your authority extends to the
16 boundary of the conflict and no further. You can enjoin 622 to
17 the extent of a conflict; perhaps only conceptual, hypothetical,
18 abstract conflict, because we have shown there is no actual one.
19 But that's the limit of your authority to enjoin enforcement and
20 operation of 622.
21 So what is the boundary of that conflict? It's
22 discernment by 622 on one hand but certainly by EMTALA on the
23 other hand. You can't say that 622, with its intent to protect
24 the life of the child, conflicts with subpart (1), which is
25 Congress's intent to protect the child.

1 You don't have the "unborn child" reference in subpart
2 (2) and subpart (3). And that's why it would be entirely wrong
3 to use subpart (1) language in any preliminary injunction order,
4 because you're going outside the scope of what Congress
5 intended.
6 Why is the Government trying to shoehorn in this
7 subpart (1) language? Well, I submit, in all due respect, that
8 it's to keep the administration's political promise to push back
9 against *Dobbs* and to restore, to the extent possible, under the
10 powers of the executive branch.
11 I would ask leave of the Court to submit a redline --
12 it's actually blue on this document --
13 THE COURT: Counsel, your time is almost up.
14 MR. STEWART: I understand that. This is the most
15 important thing I can do.
16 THE COURT: All right. I'm just letting you know. So
17 go ahead.
18 MR. STEWART: Yes. Thank you.
19 -- to submit a proposed what we call a fallback
20 order -- we are not consenting or agreeing or conceding
21 anything -- but that carefully, carefully defines what it is
22 that is being enjoined and carefully limits the injunction to
23 its only proper basis, which is the actual conflict based on
24 EMTALA.
25 And that's part of that packet that I requested leave

1 to submit. We can submit it after the hearing is over if you
2 prefer.
3 THE COURT: Well, the concern during oral argument is
4 the Government needs a chance to respond. So I don't know -- is
5 there a reason why it couldn't have been submitted in advance?
6 MR. STEWART: Well, it's only because we only very
7 recently realized what the Government was doing with this
8 subpart (1).
9 THE COURT: Well, I don't think there is any secret
10 here --
11 MR. STEWART: Misuse of subpart (1) --
12 THE COURT: Just a moment, Mr. Stewart.
13 There is no secret about it. You put up the
14 complaint, or at least the proposed order. I don't think there
15 is too much surprise about that.
16 What is it you want the Court to consider?
17 MR. STEWART: A blue-line of the Government's proposal
18 order which --
19 THE COURT: Well, you're --
20 MR. STEWART: -- puts in the proper limitations that
21 it does not contain.
22 THE COURT: You're over time now, but let me just ask
23 it this way: So are you saying that because of the language in
24 EMTALA at subparagraph (1) that you cite, that this indicates
25 that Congress has indicated that no abortion can be performed

1 because that would, by definition, be inimical to the life and
2 health of the fetus?
3 MR. STEWART: What I'm saying to the very best of my
4 ability, Your Honor, is that that language, subpart (1)
5 language, cannot be used to increase the risk of jeopardy to the
6 health of the unborn child because its purpose is to do the
7 opposite.
8 THE COURT: So, really, you are saying that if we have
9 a situation where an abortion is necessary to preserve the
10 health of the mother, then, in that situation, EMTALA would
11 still preclude that abortion because it does not take into
12 account the life of the unborn fetus?
13 MR. STEWART: What I'm saying -- yes. Well, let me
14 say it this way: Subpart (2) and subpart (3) set a standard.
15 By the way, the Fetal Heartbeat Act echos sub (2) and
16 sub (3). That's why the Government didn't challenge it, even
17 though it is now in effect and has criminal provisions equally
18 onerous.
19 THE COURT: But it doesn't -- as I suggested with
20 Mr. Church, it does not supersede 622. 622 is still and will be
21 in effect come Thursday.
22 MR. STEWART: No, it will not be in effect if you
23 enjoin its operation.
24 THE COURT: No, no, no. Without an injunction. I
25 mean, I thought that was obvious from my question.

1 MR. STEWART: Right, right, right. But, of course,
2 what I'm saying is --
3 THE COURT: No, no. My question is: It will still be
4 in effect; the fetal heartbeat law will not supersede or in any
5 way affect the Section 622 coming into effect on Thursday?
6 MR. STEWART: That's correct. The superseding
7 language is actually in the Fetal Heartbeat Act itself, which
8 was enacted later, a year later than the --
9 THE COURT: No. You answered my question.
10 MR. STEWART: Yes.
11 THE COURT: You're well over your time. If you want
12 to submit it, I'll look at -- I'll give you a minute to very
13 quickly summarize the argument you are going to make with this,
14 and then I'll --
15 Mr. Netter, if you, after looking at it, feel the need
16 to respond, I may give you a chance to submit a very short,
17 maybe one- or two-page response since you have not seen this in
18 advance. Or if you think you can look at it quickly and
19 incorporate that into your argument, you can do that as well.
20 MR. NETTER: Thank you, Your Honor.
21 THE COURT: Mr. Stewart, just a minute to wrap up
22 before I turn the time back to Mr. Netter.
23 MR. STEWART: In the real world, there is no conflict.
24 I'm not disputing, Your Honor, the conceptual textual conflicts,
25 but what matters is what happens in the real world.

1 And I believe the factual demonstration is very strong
2 that there is no actual conflict between the operation of 622
3 and the operation, within its intended and proper scope, of
4 the -- of the EMTALA language, especially because -- and this is
5 my last sentence -- my doctors whom I respect greatly tell me
6 that they have never encountered a case falling within subpart
7 (2) and subpart (3) where the health of the mother -- excuse
8 me -- the life of the mother was not in danger and threatened
9 and likely to occur.
10 The Government has not given you one concrete example
11 of that --
12 THE COURT: Did you read Dr. Corrigan's --
13 MR. STEWART: Yes.
14 -- other than -- other than ectopic pregnancies.
15 And you have known our position for weeks. The
16 legislature had no intent, because as our doctors told us -- one
17 of the first things they told us: What? No. An ectopic
18 pregnancy is not an abortion. Why? Because it will never
19 result in a live birth, and it will always put --
20 THE COURT: Excuse me, Counsel. Counsel, just a
21 moment. That's not the definition of "pregnancy," nor is it the
22 definition of "abortion" under the statute.
23 MR. STEWART: Well, again -- again, the conceptual as
24 opposed to the real world and the practical. My clients are
25 real-world, practical folks.

1 THE COURT: All right. Thank you.
2 Mr. Netter.
3 MR. NETTER: Your Honor, let me start with a quick
4 administrative note.
5 THE COURT: Yes.
6 MR. NETTER: To make it easier for the Court to locate
7 the representation by the State in the Idaho Supreme Court
8 proceedings as to what the affirmative defense means, I want to
9 provide a more specific citation because the filings are a bit
10 difficult to navigate.
11 It's in Case No. 49817. It is a document entitled
12 "Respondents' Response to Order Setting Hearing," and it's at
13 page 14.
14 THE COURT: I would note I understood Mr. Church is
15 not in any way running away from that statement. I think he was
16 pretty clear that the language necessary to prevent the death of
17 the pregnant patient means what it says and says what it means.
18 And I appreciate his candor that -- I don't think he
19 ran away from that, and I think he apparently took roughly the
20 same position that his colleague in the Attorney General's
21 Office took before the Idaho Supreme Court. But I appreciate
22 that, and I will look at that.
23 Go ahead.
24 MR. NETTER: I don't disagree, Your Honor. I also
25 understood Mr. Church to be attempting to faithfully interpret

1 the statutory text.
2 My only point of departure would be that Mr. Church
3 said that he was not troubled in the circumstance that the 50/50
4 hypothetical with the prospect that there could be a criminal
5 violation or criminal prosecution; whereas with reference to
6 EMTALA, I see that as deeply problematic and, from a moral
7 standpoint, extremely objectionable.
8 Now, the State's primary arguments here seem to rest
9 on the *Salerno* issues as to whether or not, as a technical
10 matter, the challenge presented by the United States is a facial
11 challenge.
12 To be clear, this is not a facial challenge that has
13 been filed by the United States. A facial challenge would be if
14 we had said: Here is one defect we have identified; and as a
15 result, the entire statute falls.
16 Our challenge is tailored to the circumstances in
17 which EMTALA applies. So every time EMTALA mandates care, Idaho
18 law must yield.
19 Now, I thought I understood Mr. Church to be saying
20 also that perhaps it's okay, that maybe this can be litigated
21 later, or perhaps there is, like, an affirmative defense that
22 can be raised in criminal proceedings stemming from EMTALA. And
23 that last point might have been from Mr. Stewart.
24 So I want to be clear on this: That the injury to the
25 United States takes place sooner. That the issue here is, as

1 the physicians have told us in their declarations, there will be
2 hesitancy to comply with federal law.
3 The federal interest here is in ensuring that the
4 benefit of the bargain -- the federal law -- in ensuring that
5 the emergency care that is prescribed by EMTALA is actually
6 delivered.
7 And if there are circumstances in which a doctor
8 hesitates, in which a doctor has to call the lawyers and get a
9 legal opinion because it seems like Idaho law might be violated
10 or has to speak with Mr. Stewart about his sense of whether,
11 despite the statutory text the prosecutor is going to bring the
12 charges, this is all in conflict with EMTALA and federal law,
13 which requires the care to be offered at the point where it's
14 necessary.
15 Now, Mr. Stewart said in this context that Idaho has
16 drawn its line. And I want to be clear that our position is
17 that Idaho doesn't get to draw a line that conflicts with
18 EMTALA.
19 Federal law has prescribed a standard to the extent of
20 any direct conflict -- which, in this context, means
21 impossibility or obstacle preemption -- federal law governs.
22 And Idaho doesn't have the prerogative, under the supremacy
23 clause of the U.S. Constitution, to draw its own distinct line.
24 So Mr. Stewart just brought up the statutory language
25 about "unborn child." And I'll say first that I don't believe

1 that this issue is properly before the Court. It was not raised
2 in the papers. Indeed, both the State and the legislature
3 indicated that they agreed that there were circumstances under
4 which EMTALA would require abortions as a stabilizing treatment.
5 I understood Mr. Stewart's argument to be, because of
6 this "unborn child" language in the statute that, in fact, the
7 opposite is true. And that position has surely been forfeited.
8 In any event, that interpretation of the statute, the
9 interpretation of the statute that I think Mr. Stewart was
10 intimating at, is just not correct.
11 The "unborn child" language did not appear in EMTALA
12 as it was originally adopted. It was incorporated through an
13 amendment that was adopted in 1989. There is nothing in the
14 text or in the statutory history that suggests that Congress was
15 trying to prohibit emergency abortions in some extremely
16 roundabout fashion.
17 Instead, it appears that it occurred to somebody that
18 there could be an emergency condition pertaining only to a
19 fetus; and that if a pregnant individual appeared at a hospital
20 and she was herself healthy but had a fetal condition, that the
21 hospital should be providing treatment under the same
22 circumstances.
23 Now, none of this suggests that emergency abortions
24 have somehow become unlawful or unnecessary under EMTALA.
25 Indeed, it is meaningful that the requirement under EMTALA is

1 not for the doctor to actually perform a particular treatment
2 but for the hospital to offer the treatment and to discuss the
3 pros and cons, the risks and the benefits of the treatment. And
4 if after that discussion of the risks and benefits, the patient
5 refuses to provide informed consent for the procedure, then
6 that's the patient's prerogative.
7 And we have seen in some of the declarations that it
8 does sometimes happen; that when doctors make recommendations
9 about medical care, patients think otherwise.
10 There are some other indications, too, post the 1989
11 amendment, that suggest that Mr. Stewart's potential
12 interpretation of the "unborn child" language doesn't work.
13 We noted in our opening brief that Congressman Weldon,
14 the author of the Weldon Amendment -- which is designed to
15 protect from discrimination institutions that decline to provide
16 abortions -- in the legislative history of the Weldon Amendment
17 in 2005, Representative Weldon was asked: Why doesn't your
18 amendment mean that when women are experiencing life-threatening
19 conditions, that they will be effectively dying on the operating
20 table?
21 And his response, coming from the perspective of
22 somebody who was trying to empower institutions that decline to
23 provide abortions, was that EMTALA would govern in those
24 circumstances and that nothing in his amendment would preclude
25 the provision of that lifesaving care under federal law.

1 Likewise, through the Affordable Care Act in 2010,
2 42 U.S.C. 18023, Congress provided circumstances under which a
3 state can exclude abortions from the health plans that are
4 offered on the marketplace in the state. And in so doing,
5 Congress explicitly recognized that nothing in the Affordable
6 Care Act was designed to overcome the provisions of EMTALA in
7 that context.
8 Mr. Church also brought up the heartbeat law. He
9 suggested that we had endorsed the exception to the heartbeat
10 law. And I just want to make clear that we haven't done so.
11 The fact that we haven't expressly challenged the
12 exception in the heartbeat law doesn't mean that we have blessed
13 that particular formulation, particularly in light of the fact
14 that, under our reading of 18-8804 and -8805, that law is
15 effectively to expire later this week.
16 I was having a hard time understanding if Mr. Church
17 was suggesting that the heartbeat law could survive to the
18 extent this Court were to enjoin the Total Abortion Ban.
19 We certainly don't read 18-8804 and 18-8805 to provide
20 that avenue. It says if the Total Abortion Ban becomes
21 enforceable -- which it would even if it's enjoined to the
22 extent that it's in conflict with federal law -- that the
23 heartbeat law would no longer be in effect.
24 Your Honor, I want to go back to the point that
25 Mr. Stewart made suggesting that the statutory text doesn't

1 matter here, effectively, because he knows what prosecutors
2 think.
3 I have no way to gauge whether or not he truly
4 understands how the prosecutors in each county of this state
5 think or how the voters are going to think about prosecutors
6 they are going to elect in the future or how members of a grand
7 jury might think before taking a complaint to a magistrate.
8 But the question here is how doctors are going to
9 evaluate the statute. And we submitted in the declarations
10 explanations from the doctors about the horrifying situation
11 that they anticipate will result from the full implementation of
12 the Total Abortion Ban.
13 The other point about Mr. Stewart's representation and
14 the practicalities matter is the Court should take this as an
15 enormous concession. If the legislature, and potentially the
16 State, are taking the position that the text of the statute
17 isn't real, then that means the text of the statute isn't
18 lawful.
19 And the role of a court of law in that context is to
20 enjoin the impermissible operation of a law which will cause
21 drastic effects and dramatic consequences for pregnant
22 individuals in the state of Idaho and for physicians and for
23 medical providers.
24 So unless the Court has further questions --
25 THE COURT: No.

1 MR. NETTER: -- we would ask the Court to enter the
2 preliminary relief requested in our motion.
3 THE COURT: Thank you, Mr. Netter.
4 Counsel, I intend to issue a written decision in this
5 matter. My best guess is we won't have it done until Wednesday,
6 possibly tomorrow, but our plan is no later than Wednesday since
7 the law takes effect on Thursday.
8 I will offer just one or two observations. I am
9 having a hard time seeing how this is an as-applied challenge
10 where there is clearly a very narrow and, as I think, frankly,
11 Mr. Stewart has argued, a very rare, in his view, perhaps
12 nonexistent threat, but it's certainly in very limited
13 circumstances where the abortion statute would be precluded.
14 I hope I made clear: It seems to me it's clearly an
15 as-applied challenge, and I have a hard time seeing how this
16 could be a facial challenge.
17 Another thought that I think I do want to observe.
18 Mr. Stewart has made a great deal that we should focus on the
19 real-world events and not on the text, the conceptual language
20 of the statute.
21 The concern is, of course, that real-world events are
22 very hard to predict. The text of the statute is very easy to
23 read and understand. And I think the case law is absolutely
24 clear that it is the text that matters and that we
25 don't -- judges are not issued some kind of a crystal ball when

1 they're appointed to the bench that allows them to see what the
2 facts are, but we are generally trained in interpreting the
3 case, the statutory language.
4 And I think this case kind of underscores why the case
5 law is clear that we do need to look at the text in determining
6 whether there is a conflict between federal law and state law.
7 Simply put, doctors in emergency rooms and labor and
8 delivery rooms around this state are going to be forced to
9 navigate their way through this conflict between the abortion
10 statute and EMTALA. I think it is not much comfort to a doctor
11 in that there is a sitting prosecutor who they think will not
12 enforce it, but no one knows for sure.
13 And importantly, the text matters in terms of
14 impacting the decisions made by those doctors when they confront
15 a life-or-death situation involving a pregnancy that has gone
16 horribly wrong.
17 So I think in terms of determining preemption, we have
18 to look at the statute. And I have a very hard time seeing how
19 we can compare the abortion statute as we think it may be
20 applied to what EMTALA requires when we certainly can't rule out
21 the possibility that it will, indeed, be enforced.
22 Indeed, the legislature would not have adopted the law
23 unless they intended that it would be enforced according to the
24 exact terms that they set forth. I don't think our legislature
25 ever intends a law thinking that it will not be enforced

1 according to its terms.

2 And that's why I think the law is clear that that's

3 what we look at; we look at the statutory language. We don't

4 guess about what a prosecutor will or won't do. And I think

5 I'll just leave it at that.

6 So there are some other concerns I've got. I've tried

7 to point those out at the outset in my questioning. We will

8 issue a written decision. I think, without any doubt, it will

9 be filed no later than Wednesday so we have a clear guidance one

10 way or the other before the statute takes effect.

11 Is there anything else, Counsel?

12 MR. NETTER: No, Your Honor.

13 MR. STEWART: No, Your Honor.

14 MR. CHURCH: Nothing from the State, Your Honor.

15 THE COURT: Then we'll be in recess.

16 (Proceedings concluded at 10:50 a.m.)

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1 REPORTER'S CERTIFICATE
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4 I, TAMARA I. HOHENLEITNER, CSR, RPR, CRR, certify that
5 the foregoing is a correct transcript of proceedings in the
6 above-entitled matter.
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14 /s/ Tamara I. Hohenleitner 08/24/2022
15 TAMARA I. HOHENLEITNER, CSR, RPR, CRR Date
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1:22cv329, The United States V. State Of Idaho

US District Court Docket

United States District Court, Idaho

(Boise - Southern)

This case was retrieved on 09/11/2023

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Proceedings

#	Date	Proceeding Text	Source
1	08/02/2022	COMPLAINT against State of Idaho, filed by The United States. (Attachments: # 1 Cover Sheet, # 2 Cover Sheet Counsel attachment, # 3 Summons)(Newman, Lisa) (Attachment 1 cover sheet replaced with PDF that cannot be edited on 8/3/2022) (ac).	
2	08/02/2022	NOTICE of Appearance by Anna Lynn Deffebach on behalf of All Plaintiffs (Deffebach, Anna)	
3	08/02/2022	NOTICE of Appearance by Julie Straus Harris on behalf of The United States (Straus Harris, Julie)	
4	08/03/2022	Summons Issued as to State of Idaho. (Print attached Summons for service.) (ac)	
5	08/04/2022	NOTICE of Appearance by Daniel Schwei on behalf of United States of America (Schwei, Daniel)	

#	Date	Proceeding Text	Source
6	08/04/2022	SUMMONS Returned Executed by United States of America. State of Idaho served on 8/2/2022, answer due 8/23/2022. (Newman, Lisa)	
7	08/04/2022	NOTICE of Appearance by Christopher A. Eiswerth on behalf of United States of America (Eiswerth, Christopher)	
8	08/04/2022	NOTICE of Appearance by Emily Nestler on behalf of United States of America (Nestler, Emily)	
9	08/04/2022	NOTICE of Appearance by Megan Ann Larrondo on behalf of State of Idaho (Larrondo, Megan)	
10	08/05/2022	NOTICE of Appearance by Brian David Netter on behalf of United States of America (Netter, Brian)	
11	08/05/2022	NOTICE of Availability of Magistrate Judge and Requirement for Consent sent to counsel for State of Idaho, United States of America re 1 Complaint, 9 Notice of Appearance Consent/Objection to Magistrate due by 10/4/2022. (alw)	
12	08/05/2022	NOTICE of Appearance by Steven Lamar Olsen on behalf of State of Idaho (Olsen, Steven)	
13	08/05/2022	DOCKET ENTRY ORDER: In accordance with the agreement reached by the parties and discussed with the Court at an informal status conference, the following briefing schedule is ordered. The United States will file its motion for injunctive relief on Monday, August 8. The State of Idaho will file its response on Tuesday, August 16. The United States will file its reply brief by 12:00 pm MDT on Friday, August 19. The Court will have a hearing on the motion, which will be set by separate notice, on August 22. Signed by Judge B Lynn Winmill. (hgp)	
21	08/05/2022	Docket Text Minute Entry for proceedings held before Judge B Lynn Winmill: A Status Conference was held via Zoom on 8/5/2022. Appearing on behalf of Plaintiff: Lisa Newman, Daniel Schwei, and Brian Netter. Appearing on behalf of Defendant: Megan Larrondo and Steve Olsen. The Court discussed a briefing schedule regarding Plaintiff's motion for injunctive relief (see Dkt. 13). Hearing was held informally and was not recorded. Time: 1:04-1:14p.m. (jlg) (Entered: 08/10/2022)	
14	08/08/2022	ORDER. An amicus curiae supporting the United States of America must file its brief, accompanied by a motion for filing, no later than August 15, 2022. An amicus curiae supporting the State of Idaho must file its brief, accompanied by a motion for filing, no later than 12:00 MDT on August 19, 2022. An amicus curiae that does not support either party must file its brief no later than no later than 12:00 MDT on August 19, 2022. Signed by Judge B Lynn Winmill. (alw)	
15	08/08/2022	Expedited MOTION to Intervene Daniel W. Bower, Monte N Stewart appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Responses due by 8/29/2022 (Attachments: # 1 Memorandum in Support of Motion to Intervene, # 2 Exhibit 1 Proposed Answer)(Bower, Daniel)	
16	08/08/2022	MOTION to Expedite Idaho Legislatures Motion to Intervene Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Responses due by 8/29/2022 (Bower, Daniel)	
17	08/08/2022	MOTION for Preliminary Injunction Lisa Newman appearing for Plaintiff United States of America. Responses due by 8/29/2022 (Attachments: # 1 Memorandum in Support, # 2 Proposed Order, # 3 Ex. A, Fleisher Declaration, # 4 Fleisher Appendix, Pt. 1, # 5 Fleisher Appendix, Pt. 2, # 6 Ex. B, Corrigan Declaration, # 7 Ex.	

#	Date	Proceeding Text	Source
		C, Cooper Declaration, # 8 Ex. D, Seyb Declaration, # 9 Ex. E, Wright Declaration, # 10 Ex. F, Shadle Declaration, # 11 Ex. G, Newman Declaration, # 12 Newman Appendix, Pt. 1, # 13 Newman Appendix, Pt. 2)(Newman, Lisa)	
18	08/09/2022	DOCKET ENTRY ORDER: The parties shall respond to the motion to intervene (Dkt. 15) by Wednesday, August 10, 2022. Signed by Judge B Lynn Winmill. (hgp)	
19	08/09/2022	AMENDED ORDER re 14 Order. Signed by Judge B Lynn Winmill. (alw)	
20	08/10/2022	NOTICE by State of Idaho re 15 Expedited MOTION to Intervene State of Idaho's Non-Opposition (Larrondo, Megan)	
22	08/10/2022	DOCKET ENTRY NOTICE OF HEARING regarding 17 Motion for Preliminary Injunction: A Motion Hearing is set for 8/22/2022 at 9:30 AM in Boise - Courtroom 2 before Judge B Lynn Winmill. (jlg)	
23	08/10/2022	RESPONSE to Motion re 15 Expedited MOTION to Intervene filed by United States of America. Replies due by 8/24/2022.(Deffebach, Anna)	
24	08/11/2022	DOCKET ENTRY ORDER: If the Idaho Legislature wishes to file its optional reply brief in support of its motion to intervene (filed at Dkt. 15), it must do so by 5:00 p.m. Mountain Time today, August 11, 2022. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls)	
25	08/11/2022	REPLY to Response to Motion re 15 Expedited MOTION to Intervene filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature.Motion Ripe Deadline set for 8/12/2022.(Bower, Daniel)	
26	08/12/2022	NOTICE of Appearance by Brian V Church on behalf of State of Idaho (Church, Brian)	
27	08/13/2022	MEMORANDUM DECISION AND ORDER granting in part and denying in part 15 Motion to Intervene. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls)	
28	08/15/2022	DOCKET ENTRY ORDER: The Court amends its oral order, made during the informal status conference today, as follows: The Legislature's deadline for submitting affidavits in supports of its response shall be due by 12:00 p.m., Mountain Time, on Wednesday, August 17, 2022. The Legislature's deadline to submit its brief opposing the United States Motion for Preliminary Injunction shall remain the same: that brief is due on August 16, 2022. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls)	
29	08/15/2022	AMENDED DOCKET ENTRY NOTICE OF HEARING regarding 17 Motion for Preliminary Injunction: The Motion Hearing set for 8/22/2022 is rescheduled to begin at 9:00 AM in Boise - Courtroom 2 before Judge B Lynn Winmill. (jlg)	
30	08/15/2022	Minute Entry for proceedings held before Judge B Lynn Winmill: Video Status Conference was held on 8/15/2022. (Court Reporter Tammy Hohenleitner.) (jlg)	
31	08/15/2022	NOTICE of Appearance by Joan Elizabeth Callahan on behalf of State of Idaho (Callahan, Joan)	
32	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Laura Etlinger. (Filing fee $ 250 receipt number AIDDC-2435922.)Laura Etlinger appearing for Amicus Parties New York, State of, California, State	

#	Date	Proceeding Text	Source
		of, Connecticut, State of, Colorado, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington, State of, Washington DC. Responses due by 9/6/2022 (Etlinger, Laura)	
33	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Jay Alan Sekulow. (Filing fee $ 250 receipt number AIDDC-2436019.)Jay Alan Sekulow appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Sekulow, Jay)	
34	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Jordan A. Sekulow. (Filing fee $ 250 receipt number AIDDC-2436031.)Jordan A. Sekulow appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Sekulow, Jordan)	
35	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Stuart J. Roth. (Filing fee $ 250 receipt number AIDDC-2436050.)Stuart Roth appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Roth, Stuart)	
36	08/15/2022	MEMORANDUM/BRIEF filed by United States of America Regarding Live Testimony at August 22 Preliminary Injunction Hearing. (Schwei, Daniel)	
37	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Olivia F. Summers. (Filing fee $ 250 receipt number AIDDC-2436080.)Olivia F. Summers appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Summers, Olivia)	
38	08/15/2022	DOCKET ENTRY ORDER approving 32 Motion for Pro Hac Vice Appearance of attorney Laura Etlinger for California, State of,Laura Etlinger for Colorado, State of,Laura Etlinger for Connecticut, State of,Laura Etlinger for Delaware, State of,Laura Etlinger for Hawaii, State of,Laura Etlinger for Illinois, State of,Laura Etlinger for Maine, State of,Laura Etlinger for Maryland, State of,Laura Etlinger for Massachusetts, State of,Laura Etlinger for Michigan, State of,Laura Etlinger for Minnesota, State of,Laura Etlinger for Nevada, State of,Laura Etlinger for New Jersey, State of,Laura Etlinger for New Mexico, State of,Laura Etlinger for New York, State of,Laura Etlinger for North Carolina, State of,Laura Etlinger for Oregon, State of,Laura Etlinger for Pennsylvania, State of,Laura Etlinger for Rhode Island, State of,Laura Etlinger for Washington DC,Laura Etlinger for Washington, State of Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	
39	08/15/2022	MOTION for Leave to File Brief as Amici Curiae Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Attachments: # 1 Exhibit Ex. A to Motion for Leave to File Brief of Amici Curiae)(Olson, Wendy) Modified on 8/16/2022 to change party filed name (alw).	
40	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Amanda K. Rice. (Filing fee $ 250 receipt number AIDDC-2436111.)Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Olson, Wendy) Modified on 8/16/2022 to change filing party name (alw).	
41	08/15/2022	DOCKET ENTRY ORDER approving 33 34 35 36 Motion for Pro	

#	Date	Proceeding Text	Source
		Hac Vice Appearance of attorney Jay Alan Sekulow,Jordan A. Sekulow,Stuart Roth,Olivia F. Summers for American Center for Law & Justice Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	
42	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Jacob M. Roth. (Filing fee $ 250 receipt number AIDDC-2436117.)Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Olson, Wendy) Modified on 8/16/2022 to change filing party name (alw).	
43	08/15/2022	MOTION FOR PRO HAC VICE APPEARANCE by Charlotte H. Taylor. (Filing fee $ 250 receipt number AIDDC-2436127.)Wendy Olson appearing for Amicus The American Hospital Association and The Association of American Medical Colleges. Responses due by 9/6/2022 (Olson, Wendy) Modified on 8/16/2022 to change filing party name (alw).	
44	08/15/2022	MEMORANDUM/BRIEF filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature Regarding Live Testimony at August 22 Preliminary Injunction Hearing. (Bower, Daniel)	
45	08/15/2022	MOTION to File Amicus Brief Laura Etlinger appearing for Amicus Parties California, State of, Colorado, State of, Connecticut, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, New York, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington DC, Washington, State of. Responses due by 9/6/2022 (Attachments: # 1 Memorandum in Support proposed amicus brief)(Etlinger, Laura)	
46	08/15/2022	MEMORANDUM/BRIEF filed by State of Idaho re: letter brief requested by Dkt. 30. (Church, Brian)	
47	08/15/2022	MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Shannon Rose Selden. Shannon Rose Selden appearing for Amicus Parties American College of Emergency Physicians, Idaho Chapter of the American College of Emergency Physicians, American College of Obstetricians and Gynecologists, Society for Maternal-Fetal Medicine, National Medical Association, National Hispanic Medical Association, American Academy of Pediatrics, American Academy of Family Physicians, American Public Health Association, American Medical Association,. Responses due by 9/6/2022 (Selden, Shannon)	
48	08/15/2022	MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Leah Martin. Leah S. Martin appearing for Amicus Parties American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/6/2022 (Martin, Leah)	
49	08/15/2022	MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Adam Aukland-Peck. Adam B. Aukland-Peck appearing for Amicus Parties American Academy of Family	

#	Date	Proceeding Text	Source
		Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/6/2022 (Aukland-Peck, Adam)	
50	08/15/2022	MOTION to File Amicus Brief (UNOPPOSED) Shannon Rose Selden appearing for Amicus Parties American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/6/2022 (Attachments: # 1 Exhibit Brief of Amici Curiae in Support of Plaintiffs Motion for a Preliminary Injunction)(Selden, Shannon)	
51	08/16/2022	ERRATA by Amicus Parties California, State of, Colorado, State of, Connecticut, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, New York, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington DC, Washington, State of re 45 MOTION to File Amicus Brief . (Attachments: # 1 Memorandum in Support corrected signature blocks on amicus brief and motion)(Etlinger, Laura)	
52	08/16/2022	DOCKET ENTRY ORDER approving 40 42 43 Motion for Pro Hac Vice Appearance of attorney Amanda K Rice,Jacob M Roth,Charlotte H Taylor for The American Hospital Association,Amanda K Rice,Jacob M Roth,Charlotte H Taylor for The Association of American Medical Colleges Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	
	08/16/2022	CORRECTIVE ENTRY - The entry docket number 47 48 49 MOTION FOR ADMISSION PRO HAC VICE AND MOTION FOR WAIVER OF FEE by Shannon Rose Selden. filed by American Public Health Association, American College of Obstetricians and Gynecologists, Society for Maternal-Fetal Medicine, American Academy of Family Physicians, National Hispanic Medical Association, American College of Emergency Physicians, Idaho Chapter of the American College of Emergency Physicians, National Medical Association, American Medical Association,, American Academy of Pediatrics was filed incorrectly in this case. The filing parties shall re-submit their motions for pro hac and pay the filing fee.(alw)	
53	08/16/2022	MOTION FOR PRO HAC VICE APPEARANCE by Shannon Rose Selden. (Filing fee $ 250 receipt number AIDDC-2436424.)Shannon Rose Selden appearing for Amicus Parties American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/6/2022 (Selden, Shannon)	

#	Date	Proceeding Text	Source
54	08/16/2022	MOTION FOR PRO HAC VICE APPEARANCE by Leah Martin. (Filing fee $ 250 receipt number AIDDC-2436438.)Leah S. Martin appearing for Amicus Parties American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/6/2022 (Martin, Leah)	
55	08/16/2022	MOTION FOR PRO HAC VICE APPEARANCE by Adam Aukland-Peck. (Filing fee $ 250 receipt number AIDDC-2436445.)Adam B. Aukland-Peck appearing for Amicus Parties American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/6/2022 (Aukland-Peck, Adam)	
56	08/16/2022	DOCKET ENTRY ORDER: 39 The American Hospital Association and The Association of American Medical Colleges' Motion for Leave to File Brief as Amici Curiae is GRANTED. Amici are directed to formally file their [39-1] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
57	08/16/2022	DOCKET ENTRY ORDER: 45 The States of California, New York, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, and Washington, and Washington, D.C.'s Motion to file Amicus Brief is GRANTED. Amici States are directed to formally file their Proposed Brief [45-1]. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
58	08/16/2022	DOCKET ENTRY ORDER: 50 American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine's Motion to file Amicus Brief is GRANTED. Amici are directed to formally file their [50-1] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
59	08/16/2022	RESPONSE to Motion re 17 MOTION for Preliminary Injunction filed by California, State of, Colorado, State of, Connecticut, State of, Delaware, State of, Hawaii, State of, Illinois, State of, Maine, State of, Maryland, State of, Massachusetts, State of, Michigan, State of, Minnesota, State of, Nevada, State of, New Jersey, State of, New Mexico, State of, New York, State of, North Carolina, State of, Oregon, State of, Pennsylvania, State of, Rhode Island, State of, Washington DC, Washington, State of. Replies due by 8/30/2022.(Etlinger, Laura)	

#	Date	Proceeding Text	Source
60	08/16/2022	DOCKET ENTRY ORDER approving 53 54 55 Motion for Pro Hac Vice Appearance of attorney Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for American Academy of Family Physicians,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for American Academy of Pediatrics,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for American College of Emergency Physicians,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for American College of Obstetricians and Gynecologists,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for American Medical Association,,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for American Public Health Association,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for Idaho Chapter of the American College of Emergency Physicians,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for National Hispanic Medical Association,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for National Medical Association,Shannon Rose Selden,Leah S. Martin,Adam B. Aukland-Peck for Society for Maternal-Fetal Medicine Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	
61	08/16/2022	MOTION FOR PRO HAC VICE APPEARANCE by Laura B. Hernandez. (Filing fee $ 250 receipt number AIDDC-2436596.)Laura Hernandez appearing for Amicus American Center for Law & Justice. Responses due by 9/6/2022 (Hernandez, Laura)	
62	08/16/2022	RESPONSE to Motion re 17 MOTION for Preliminary Injunction filed by American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Replies due by 8/30/2022.(Selden, Shannon)	
63	08/16/2022	RESPONSE re 17 MOTION for Preliminary Injunction filed by The American Hospital Association, The Association of American Medical Colleges /Amicus Brief re Docket 39. (Olson, Wendy)	
64	08/16/2022	DOCKET ENTRY ORDER approving 61 Motion for Pro Hac Vice Appearance of attorney Laura Hernandez for American Center for Law & Justice Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	
65	08/16/2022	MEMORANDUM in Opposition re 17 MOTION for Preliminary Injunction filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Replies due by 8/30/2022.(Bower, Daniel)	
66	08/16/2022	RESPONSE to Motion re 17 MOTION for Preliminary Injunction filed by State of Idaho. Replies due by 8/30/2022. (Attachments: # 1 Declaration of Kraig White MD, # 2 Declaration of Randy Rodriguez)(Church, Brian)	
67	08/17/2022	MOTION FOR PRO HAC VICE APPEARANCE by Jeffrey B. Dubner. (Filing fee $ 250 receipt number AIDDC-2437111.)Jeffrey B. Dubner appearing for Amicus Parties American Academy of Family Physicians, American Academy of	

#	Date	Proceeding Text	Source
		Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/7/2022 (Dubner, Jeffrey)	
68	08/17/2022	MOTION FOR PRO HAC VICE APPEARANCE by John T. Lewis. (Filing fee $ 250 receipt number AIDDC-2437139.)John Lewis appearing for Amicus Parties American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/7/2022 (Lewis, John)	
69	08/17/2022	MOTION for Leave to File LEGAL ARGUMENTS Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Responses due by 9/7/2022 (Attachments: # 1 Exhibit Legislatures unique legal arguments)(Bower, Daniel)	
70	08/17/2022	DOCKET ENTRY ORDER approving 67 68 Motion for Pro Hac Vice Appearance of attorney John Lewis,Jeffrey B. Dubner for American Academy of Family Physicians,John Lewis,Jeffrey B. Dubner for American Academy of Pediatrics,John Lewis,Jeffrey B. Dubner for American College of Emergency Physicians,John Lewis,Jeffrey B. Dubner for American College of Obstetricians and Gynecologists,John Lewis,Jeffrey B. Dubner for American Medical Association,,John Lewis,Jeffrey B. Dubner for American Public Health Association,John Lewis,Jeffrey B. Dubner for Idaho Chapter of the American College of Emergency Physicians,John Lewis,Jeffrey B. Dubner for National Hispanic Medical Association,John Lewis,Jeffrey B. Dubner for National Medical Association,John Lewis,Jeffrey B. Dubner for Society for Maternal-Fetal Medicine Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	
71	08/17/2022	AFFIDAVIT in Opposition re 17 MOTION for Preliminary Injunction filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Replies due by 8/31/2022. (Attachments: # 1 Affidavit Reynolds Declaration, # 2 Affidavit Harder Declaration, # 3 Exhibit Idaho Report of Induced Termination of Pregnancy, # 4 Exhibit Idaho Abortion Reporting Response, # 5 Affidavit French Declaration, # 6 Affidavit Loebs Declaration)(Bower, Daniel)	
72	08/17/2022	NOTICE of Appearance by Alan Wayne Foutz on behalf of State of Idaho (Foutz, Alan)	
73	08/17/2022	MEMORANDUM DECISION AND ORDER. Legislatures request for an evidentiary hearingis DENIED. Signed by Judge B Lynn Winmill. (alw)	
74	08/17/2022	MOTION to File Amicus Brief Olivia F. Summers appearing for Amicus American Center for Law & Justice. Responses due by 9/7/2022 (Attachments: # 1 Memorandum in Support, # 2 Proposed Order)(Summers, Olivia)	
75	08/17/2022	DOCKET ENTRY ORDER: Before the Court is the Idaho	

#	Date	Proceeding Text	Source
		Legislature's Motion for Leave to File Legal Arguments 69 . Having considered the Legislature's Motion, the Court declines at this juncture to modify the conditions it imposed in its earlier Order 27 allowing the Legislature to permissively intervene. Allowing the Legislature to file an additional brief past the deadline of the expedited briefing schedule would unduly prejudice the United States, which must file its reply brief by 12:00 pm MST, on August 19, 2022. In addition, the Legislatures total briefing would exceed not only the 15-page limit imposed by the Court but would also exceed the 20-page limit imposed by the Local Rules to which both the United States and the State of Idaho have adhered. IT IS THEREFORE ORDERED that the Legislature's Motion for Leave to File Legal Arguments 69 is DENIED. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
76	08/17/2022	DOCKET ENTRY ORDER: The American Center for Law & Justice's 74 Motion for Leave to file Amicus Brief in Support of Defendant's Response to Plaintiff's Motion for Preliminary Injunction is GRANTED. The ACLJ is directed to formally file its [74-1] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
77	08/17/2022	MOTION for Extension of Time to File Answer or Otherwise Respond (unopposed) Brian V Church appearing for Defendant State of Idaho. Responses due by 9/7/2022 (Attachments: # 1 Memorandum in Support)(Church, Brian)	
78	08/17/2022	DOCKET ENTRY ORDER GRANTING Motion for Extension of Time to Answer or Otherwise Respond (Dkt. 77). The State of Idaho shall answer or other respond by September 23, 2022. Signed by Judge B Lynn Winmill. (hgp)	
79	08/18/2022	Minute Entry for proceedings held before Judge B Lynn Winmill: An informal Video Status Conference was held on 8/18/2022. (Court Reporter/ESR Not recorded.) Hearing Not Recorded. (jlg)	
80	08/18/2022	MEMORANDUM/BRIEF re 76 Order on Motion to File Amicus Brief, 74 MOTION to File Amicus Brief filed by American Center for Law & Justice Amicus Brief in Support of Defendant's Response. (Summers, Olivia)	
81	08/18/2022	MOTION FOR PRO HAC VICE APPEARANCE by Thomas M. Fisher. (Filing fee $ 250 receipt number AIDDC-2437960.)Thomas Molnar Fisher appearing for Amicus State of Indiana. Responses due by 9/8/2022 (Fisher, Thomas)	
82	08/19/2022	MOTION FOR PRO HAC VICE APPEARANCE by Maher Mahmood. (Filing fee $ 250 receipt number AIDDC-2438637.)Maher Mahmood appearing for Amicus Parties American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, American College of Obstetricians and Gynecologists, American Medical Association,, American Public Health Association, Idaho Chapter of the American College of Emergency Physicians, National Hispanic Medical Association, National Medical Association, Society for Maternal-Fetal Medicine. Responses due by 9/9/2022 (Mahmood, Maher)	
83	08/19/2022	DOCKET ENTRY ORDER approving 81 Motion for Pro Hac Vice Appearance of attorney Thomas Molnar Fisher for State of Indiana Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	

#	Date	Proceeding Text	Source
84	08/19/2022	DOCKET ENTRY ORDER approving 82 Motion for Pro Hac Vice Appearance of attorney Maher Mahmood for American Academy of Family Physicians,Maher Mahmood for American Academy of Pediatrics,Maher Mahmood for American College of Emergency Physicians,Maher Mahmood for American College of Obstetricians and Gynecologists,Maher Mahmood for American Medical Association,,Maher Mahmood for American Public Health Association,Maher Mahmood for Idaho Chapter of the American College of Emergency Physicians,Maher Mahmood for National Hispanic Medical Association,Maher Mahmood for National Medical Association,Maher Mahmood for Society for Maternal-Fetal Medicine Per Local Rule 83.4(e), out-of-state counsel shall immediately register for ECF. (Notice sent to CM/ECF Registration Clerk) (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (alw)	
85	08/19/2022	AMENDED DOCUMENT by State of Indiana. Application for Admission Pro Hac Vice on behalf of States of Indiana, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. (Fisher, Thomas)	
86	08/19/2022	REPLY to Response to Motion re 17 MOTION for Preliminary Injunction filed by United States of America.Motion Ripe Deadline set for 8/22/2022. (Attachments: # 1 Exhibit List, # 2 Ex. H, Supplemental Fleisher Declaration, # 3 Ex. I, Supplemental Corrigan Declaration, # 4 Ex. J, Huntsberger Declaration, # 5 Ex. K, Supplemental Cooper Declaration, # 6 Ex. L)(Newman, Lisa)	
87	08/19/2022	MOTION for Leave to File Brief of Indiana and 16 Other States as Amici Curiae in Support of Defendant Thomas Molnar Fisher appearing for Amicus State of Indiana. Responses due by 9/9/2022 (Attachments: # 1 Exhibit Text of Proposed Order, # 2 Memorandum in Support)(Fisher, Thomas)	
88	08/19/2022	DOCKET ENTRY NOTICE OF HEARING regarding 17 MOTION for Preliminary Injunction: A Motion Hearing is set for 8/22/2022 at 9:00 AM in Boise - Courtroom 2 before Judge B Lynn Winmill. Members of the public may attend the hearing remotely. Remote access will be audio only - there will not be video. To access an audio feed from the hearing, members of the public may call this number: 208-684-0990. Then, when they are prompted for the conference ID, they should enter 238 965 497#.(jlg)	
89	08/19/2022	DOCKET ENTRY ORDER: 87 Unopposed Motion for Leave to File Brief of Indiana and 16 Other States as Amici Curiae in Support of Defendant is GRANTED. Amici are directed to file their [87-2] Proposed Brief. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
90	08/19/2022	MEMORANDUM/BRIEF re 89 Order on Motion for Leave to File, filed by State of Alabama, State of Arkansas, State of Indiana, State of Kentucky, State of Louisiana, State of Mississippi, State of Montana, State of North Dakota, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of Texas, State of Utah, State of West Virginia, State of Wyoming, State of Nebraska. (Fisher, Thomas) Modified on 8/25/2022 to add party (alw).	
91	08/19/2022	NOTICE by State of Idaho Notice of Appearance Special Deputy Attorney General Clay R. Smith (Church, Brian)	
92	08/22/2022	Minute Entry for proceedings held before Judge B Lynn Winmill: A Motion Hearing was held on 8/22/2022 re 17 MOTION for Preliminary Injunction filed by United States of America. A written	

#	Date	Proceeding Text	Source
		decision is forthcoming. (Court Reporter Tammy Hohenleitner.) (jlg)	
93	08/22/2022	RESPONSE filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature Objection to Proposed Order [Dkt. 17-2]. (Attachments: # 1 Exhibit 1 Proposed Fall-Back Order - redline, # 2 Exhibit 2 Proposed Fall-Back Order - clean, # 3 Exhibit 3 EMTALA)(Bower, Daniel)	
94	08/24/2022	NOTICE by State of Idaho of Supplemental Authority (Attachments: # 1 Exhibit Exhibit A - U.S. District Court for Northern District of Texas Decision)(Church, Brian)	
95	08/24/2022	MEMORANDUM DECISION AND ORDER. IT IS ORDERED that: Plaintiff's motion for a preliminary injunction (Dkt. 17) is GRANTED. This preliminary injunction is effective immediately and shall remain in full force and effect through the date on which judgment is entered in this case. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (km)	
96	08/25/2022	Notice of Filing of Official Transcript of Proceedings held on 8/22/22 before Judge B. Lynn Winmill. Court Reporter Tamara Hohenleitner, Email tammy_hohenleitner@id.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. This transcript is not available to the general public and as such is sealed until release of transcript restriction re 92 Motion Hearing. Redaction Request due 9/15/2022. Redacted Transcript Deadline set for 9/26/2022. Release of Transcript Restriction set for 11/23/2022. (th)	
97	09/07/2022	MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Responses due by 9/28/2022 (Attachments: # 1 Memorandum in Support)(Bower, Daniel)	
98	09/15/2022	NOTICE by United States of America of Factual Clarification (Attachments: # 1 Affidavit of Dr. Fleisher (Second Supplemental))(Schwei, Daniel)	
99	09/15/2022	MOTION for Extension of Time to File Response/Reply as to 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, Christopher A. Eiswerth appearing for Plaintiff United States of America. Responses due by 10/6/2022 (Attachments: # 1 Exhibit A -- Correspondence)(Eiswerth, Christopher)	
100	09/16/2022	RESPONSE to Motion re 99 MOTION for Extension of Time to File Response/Reply as to 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, Partial Non-Opposition filed by State of Idaho. Replies due by 9/30/2022.(Church, Brian)	
101	09/21/2022	MOTION for Reconsideration Brian V Church appearing for Defendant State of Idaho. Responses due by 10/12/2022 (Attachments: # 1 Memorandum in Support of State of Idaho's Motion to Reconsider)(Church, Brian)	
102	09/22/2022	ORDER. Upon consideration of the United States Motion to Extend Briefing Schedule Regarding Motions for Reconsideration, and finding good cause, IT IS ORDERED that the United States motion is GRANTED. Signed by Judge B Lynn Winmill. (alw)	
103	09/23/2022	ANSWER to 1 Complaint, by State of Idaho.(Church, Brian)	

#	Date	Proceeding Text	Source
104	09/28/2022	RESPONSE to Motion re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, (Non-Opposition) filed by State of Idaho. Replies due by 10/12/2022.(Church, Brian)	
105	10/04/2022	MOTION to Intervene Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Responses due by 10/25/2022 (Attachments: # 1 Memorandum in Support of Renewed Motion to Intervene)(Bower, Daniel)	
	10/05/2022	The 60 day deadline has expired. Case will remain with a District Judge. No more notice of availability or assignment will be sent out. Consent deadline(s) termed. (alw)	
106	10/12/2022	MEMORANDUM in Opposition re 101 MOTION for Reconsideration , 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, filed by United States of America. Replies due by 10/26/2022.(Eisworth, Christopher)	
107	10/19/2022	Joint MOTION modification of briefing schedule of Idaho Legislatures Renewed Motion to Intervene re 105 MOTION to Intervene Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Responses due by 11/9/2022 (Attachments: # 1 Exhibit)(Bower, Daniel)	
108	10/20/2022	DOCKET ENTRY ORDER granting 107 Motion. Good cause appearing, the briefing schedule on the Legislature's Renewed Motion to Intervene (Dkt. 105) is modified as follows: Responses shall be filed by October 20, 2022. The optional reply brief shall be filed by October 27, 2022. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (mls))	
109	10/20/2022	MEMORANDUM in Opposition re 105 MOTION to Intervene filed by United States of America. Replies due by 11/3/2022.(Deffebach, Anna)	
110	10/20/2022	RESPONSE to Motion re 105 MOTION to Intervene filed by State of Idaho. Replies due by 11/3/2022.(Olsen, Steven)	
111	10/26/2022	REPLY to Response to Motion re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature.Motion Ripe Deadline set for 10/27/2022.(Bower, Daniel)	
112	10/26/2022	REPLY to Response to Motion re 101 MOTION for Reconsideration filed by State of Idaho.Motion Ripe Deadline set for 10/27/2022.(Church, Brian)	
113	10/27/2022	REPLY to Response to Motion re 105 MOTION to Intervene filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature.Motion Ripe Deadline set for 10/28/2022.(Bower, Daniel)	
114	10/28/2022	NOTICE by State of Idaho of Withdrawal of Counsel (Larrondo, Megan)	
115	11/17/2022	NOTICE by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, , 105 MOTION to Intervene (Bower, Daniel)	
116	12/13/2022	NOTICE by State of Idaho of Withdrawal of Counsel (Reed, Dayton)	

1:22cv329, The United States V. State Of Idaho

#	Date	Proceeding Text	Source
117	12/14/2022	NOTICE by State of Idaho of Withdrawal of Counsel (Batey, Ingrid)	
118	12/30/2022	NOTICE by State of Idaho of withdrawal of Special Deputy Attorney General Clay R. Smith (Church, Brian)	
119	01/13/2023	MOTION Permission to File Supplemental Briefing and Notice of Supplemental Authority Brian V Church appearing for Defendant State of Idaho. Responses due by 2/3/2023 (Attachments: # 1 Memorandum in Support of Request for Permission to File Supplemental Briefing, # 2 Planned Parenthood Decision)(Church, Brian)	
120	01/13/2023	MOTION to Stay Issuance of a Decision Brian V Church appearing for Defendant State of Idaho. Responses due by 2/3/2023 (Attachments: # 1 Memorandum in Support of Motion to Stay Issuance of a Decision)(Church, Brian)	
121	01/13/2023	JOINDER by Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature joining 119 MOTION Permission to File Supplemental Briefing and Notice of Supplemental Authority, 120 MOTION to Stay Issuance of a Decision . (Attachments: # 1 Exhibit 1 Planned Parenthood Decision)(Bower, Daniel)	
	01/13/2023	NOTICE TO COURT that counsel Dayton Reed wishes to no longer be noticed electronically on this case as of the date of this notice. (Reed, Dayton)	
122	01/24/2023	DOCKET ENTRY ORDER granting 119 State of Idaho's Motion for Permission to File Supplemental Briefing on the State's pending motion for reconsideration 101 . The State of Idaho may file a supplement brief in support of its motion for reconsideration not to exceed 10 pages no later than February 6, 2023. As the Idaho Legislature has joined in the motion, it may also file a separate brief in support of its motion for reconsideration not to exceed 10 pages by February 6, 2023. In response, the United States of America may file two briefs responding to each supplemental brief filed by the State and the Legislature not to exceed ten pages each, or one omnibus response brief not to exceed 20 pages by February 21, 2023. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
123	01/24/2023	DOCKET ENTRY ORDER: IT IS ORDERED that 120 the State of Idaho's Motion to Stay Issuance of a Decision is GRANTED. The Court will not issue a decision on the pending motions to reconsider until the supplemental briefing has been completed on February 21, 2023, and the Court has had adequate time to consider the additional argument. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
124	01/24/2023	NOTICE by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature of Automatic Substitution of Certain Intervenor-Defendants (Bower, Daniel)	
125	02/03/2023	MEMORANDUM DECISION AND ORDER. Idaho Legislatures Renewed Motion to Intervene (Dkt. 105) is DENIED. Signed by Judge B Lynn Winmill. (alw)	
126	02/06/2023	MEMORANDUM in Support re 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho	

#	Date	Proceeding Text	Source
		Legislature. (Attachments: # 1 Exhibit 1)(Bower, Daniel)	
127	02/06/2023	SUPPLEMENT by Defendant State of Idaho Supplemental Brief Supporting State of Idaho's Motion for Reconsideration. (Olsen, Steven)	
128	02/06/2023	MOTION to Take Judicial Notice Steven Lamar Olsen appearing for Defendant State of Idaho. Responses due by 2/27/2023 (Attachments: # 1 Exhibit 1)(Olsen, Steven)	
129	02/21/2023	NOTICE of Appearance by Lincoln Davis Wilson on behalf of State of Idaho (Wilson, Lincoln)	
130	02/21/2023	SUPPLEMENT by Plaintiff United States of America re 101 MOTION for Reconsideration , 97 MOTION for Reconsideration re 95 Order on Motion for Preliminary Injunction, United States' Supplemental Brief in Opposition to the Motions for Reconsideration. (Deffebach, Anna)	
131	03/02/2023	NOTICE OF APPEAL as to 125 Memorandum Decision, Terminate Motions by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Filing Fee Paid. $ 505, receipt number AIDDC-2530532. (Notice sent to Court Reporter & 9th Cir) (Bower, Daniel)	
132	03/03/2023	USCA Case Number 23-35153 for 131 Notice of Appeal, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. (alw)	
133	03/03/2023	USCA Scheduling Order 23-35153 as to 131 Notice of Appeal, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. (Notice sent by e-mail to Court Reporter) (alw)	
134	05/04/2023	DOCKET ENTRY ORDER granting 128 the State of Idaho's Request to Take Judicial Notice, under Federal Rule of Evidence 201, that the Idaho Supreme Courts Planned Parenthood decision released January 5, 2023, Dkt. 119-2, is now final. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
135	05/04/2023	MEMORANDUM DECISION AND ORDER. IT IS ORDERED that: (1) the Idaho Legislatures Motion for Reconsideration of Order Granting Preliminary Injunction (Dkt. 97) is DENIED; and (2) the State of Idahos Motion to Reconsider Preliminary Injunction (Dkt. 101) is DENIED. Signed by Judge B Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (jsv)	
136	06/28/2023	NOTICE OF APPEAL (USCA 23-35440) as to 95 Order on Motion for Preliminary Injunction, 135 Order on Motion for Reconsideration,,, by State of Idaho. Filing Fee Due. $ 505, receipt number AIDDC-2590508. (Notice sent to Court Reporter & 9th Cir) (Wilson, Lincoln) Modified on 6/29/2023 to add 9CCA case number (hs).	
137	06/28/2023	USCA Case Number 23-35440 for 136 Notice of Appeal, filed by State of Idaho. (hs) (Entered: 06/29/2023)	
138	07/03/2023	NOTICE OF APPEAL (23-35450) by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Filing Fee Due. $ 505, receipt number AIDDC-2592636. (Notice sent to Court Reporter & 9th Cir) (Bower, Daniel) Modified on 7/5/2023 to add 9CCA Case Number (km).	
139	07/03/2023	TRANSCRIPT REQUEST by State of Idaho for proceedings held	

#	Date	Proceeding Text	Source
		on 8/22/2022 before Judge Winmill, (Notice sent by e-mail to Court Reporter) (Church, Brian)	
140	07/03/2023	MOTION to Stay Preliminary Injunction Pending Appeal Daniel W. Bower appearing for Intervenor Defendant Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. Responses due by 7/24/2023 (Attachments: # 1 Memorandum in Support Legislature's Memo ISO Stay)(Bower, Daniel)	
141	07/03/2023	USCA Case Number 23-35450 for 138 Notice of Appeal, filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature. (km) (Additional attachment(s) added on 7/5/2023: # 1 Notice to Review Party and Counsel Listing, # 2 Mediation Letter) (km). (Entered: 07/05/2023)	
142	07/05/2023	TRANSCRIPT REQUEST by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature for proceedings held on 08/22/2022 before Judge Winmill, (Notice sent by e-mail to Court Reporter) (Bower, Daniel)	
143	07/06/2023	NOTICE by State of Idaho of Withdrawal of Counsel (Callahan, Joan)	
144	07/24/2023	MEMORANDUM in Opposition re 140 MOTION to Stay Preliminary Injunction Pending Appeal filed by United States of America. Replies due by 8/7/2023. (Attachments: # 1 Exhibit Exhibit A)(Deffebach, Anna)	
145	08/04/2023	REPLY to Response to Motion re 140 MOTION to Stay Preliminary Injunction Pending Appeal filed by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature.Motion Ripe Deadline set for 8/7/2023.(Bower, Daniel)	
146	08/21/2023	NOTICE by Speaker of the Idaho House of Representatives Scott Bedke, Idaho Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature of Withdrawal of Counsel: Monte Neil Stewart (Bower, Daniel)	

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