No. 23-35440, 23-35450

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF IDAHO,

Defendant-Appellant,

v.

MIKE MOYLE, ET AL.

Movants-Appellants.

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

No. 1:22-cv-00329-BLW
The Honorable B. Lynn Winmill

OPENING BRIEF OF APPELLANT

RAÚL R. LABRADOR
Attorney General

Idaho Office of the Attorney General
700 W. Jefferson St.
Suite 210
Boise, ID 83720
(208) 334-2400
josh.turner@ag.idaho.gov
brian.church@ag.idaho.gov

THEODORE J. WOLD
Solicitor General
JOSHUA N. TURNER
Deputy Solicitor General

LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense
BRIAN V. CHURCH
Deputy Attorney General

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INTRODUCTION

The United States' novel preemption theory only works if the Emergency Medical Treatment and Labor Act requires participating hospitals to offer abortions. It does not.

The Act actually requires that participating hospitals provide indigent and uninsured persons with the same stabilizing treatment that they otherwise offer to paying patients. The Act does not demand that hospitals provide services they are not already providing, including abortion, *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 993–95 (9th Cir. 2001), and it does not set a nationwide standard of care. In fact, the Act explicitly references "unborn children" and promises them protection, which is entirely inconsistent with a requirement that hospitals offer their termination.

Even if the Act did require hospitals to provide abortions as stabilizing care (and it does not), there would be no gap between what the Act requires and what Idaho law allows. In Idaho, removing an ectopic pregnancy or a dead unborn child is not an abortion and is not legally restricted. Doctors may also lawfully remove a pregnancy to prevent a mother's death, and they do not need to obtain medical certainty before they do so. The district court reached a different conclusion and held that EMTALA preempts Idaho law, but that decision was wrong and premised on a previous version of the relevant Idaho statutes. Subsequent changes to Idaho law have eliminated the provisions that prompted the district court's erroneous preemption holding.

There can be no doubt that *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), worked a sea change in States' ability to regulate abortion. Nor is there any doubt that the Biden Administration disagrees with *Dobbs* and wants to set a nationwide policy that favors expanded abortion access. The Biden Administration may choose other ways to express that policy preference, including by advocating for changes to existing federal law and the Constitution. It may not choose this one. Congress did not hide an abortion mandate in EMTALA to lie dormant for thirty years and emerge in the wake of a Supreme Court decision that the Biden Administration dislikes. For over 100 years, the people of Idaho have consistently prohibited abortion, and *Dobbs* recognizes that the U.S. Constitution gives them that right. EMTALA is not to the contrary, and the decision of the district court should be reversed.

STATEMENT OF JURISDICTION

On August 2, 2022, the United States filed suit against the State of Idaho asserting a preemption claim under the United States Constitution and sought a preliminary injunction. *See* 3-StateER-369–85. The district court had jurisdiction over the action under 28 U.S.C. § 1331. On August 24, 2022, the district court granted the United States' motion for a preliminary injunction. *See* 1-StateER-51. An interlocutory order granting a preliminary injunction is immediately appealable to this Court. 28 U.S.C. § 1292(a)(1).

On September 21, 2022, the State of Idaho filed a motion for reconsideration of the preliminary injunction under Federal Rule of Civil Procedure 59(e). *See* 3-StateER-

146–78; *see also Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1123–24 (9th Cir. 2005). The motion was timely filed within 28 days of the preliminary injunction order. *See* Fed. R. Civ. P. 59(e). On May 4, 2023, the district court denied the motion for reconsideration. *See* 1-StateER-002–13.

On June 28, 2023, the State of Idaho filed a notice of appeal. 3-StateER-386–91. The notice of appeal was timely because: (1) the district court's order on the motion for a reconsideration reset the time to appeal, Federal Rule of Appellate Procedure 4(a)(4)(A)(iv), and (2) the State of Idaho had 60 days from the reconsideration order to file a notice of appeal, Federal Rule of Appellate Procedure 4(a)(1)(B)(i).

ISSUES FOR REVIEW

I. After the Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022), returned the issue of abortion to the people's elected representatives, Idaho enacted legislation that prohibits elective abortions. *See* Idaho Code § 18-622. The Emergency Medical Treatment and Labor Act—more commonly known as the "Patient Anti-Dumping Act"—prohibits hospital emergency departments from refusing to provide medical care to indigent or uninsured patients that it would otherwise offer. The United States says that EMTALA preempts Idaho Code § 18-622. The district court found that the United States was likely to succeed on its preemption claim and granted its motion for a preliminary injunction. Did the district court err?

II. The district court enjoined the State of Idaho from enforcing its law to prohibit abortions that are "necessary to avoid" an "emergency medical condition," but

it left no room for stabilizing care or transfer as alternatives to abortion. Was the district court's preliminary injunction overbroad?

ADDENDUM

An addendum containing pertinent statutes is filed concurrently with this brief. 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

Few issues are as politically charged as abortion. But this case is not about abortion. The United States and the district court cast it that way, but the central issue here is whether Congress intended a Medicare statute to establish a national standard of care and to separate States from their traditional power to regulate the practice of medicine. Even more, this case is about whether democratic institutions in this country will leave the people free to govern or whether laws will be given such malleable form that federal political actors can wield them for their own ends. The rule of law means more.

A. The State of Idaho Has Consistently Protected the Unborn Children and Mothers with Life-Threatening Pregnancies.

"Abortion presents a profound moral issue on which Americans hold sharply conflicting views." That is the opening line of the majority opinion in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022). And it is true. But the people of the State of Idaho have long held—upon recurring democratic consideration—that abortion should generally not be permitted, except as necessary to save or preserve the life of the pregnant woman.

Generations of Idahoans have protected unborn children under the law while also protecting mothers with life-threatening pregnancies. Only months after the Idaho Territory was created in 1863, the first legislative assembly for the Territory of Idaho enacted a law that made abortion a crime unless the physician deemed it necessary to save the mother's life. *Planned Parenthood Great Nw., v State*, 171 Idaho 374, ___, 522 P.3d 1132, 1149 (2023) (citing Act of Feb. 4, 1864, ch. IV, § 42, 1863-64 Idaho Terr. Sess. Laws 443). Just ten months later, the second territorial legislative session reenacted the same criminal prohibition. *Id.* (citing Act of Dec. 23, 1864, ch. III, § 42, 1864 Idaho Terr. Sess. Laws 305). And eleven years later, in 1875, the eighth territorial legislative session retained the same criminal prohibition. *Id.* (citing Act of Jan. 14, 1875, ch. IV, § 42, 1874-75 Idaho Terr. Sess. Laws 328). In 1887, the Idaho Territory again prohibited abortion unless it was necessary to preserve the mother's life and at the same time added a criminal penalty against a mother seeking an abortion unless necessary to preserve her life. *Id.* at ___, 522 P.3d at 1150 (citing Idaho Rev. Stat. §§ 6794, 6795 (1887)).

From 1887 to 1973, the Territory and then the State of Idaho retained substantially the same abortion laws. *Id.* at ___, 522 P.3d at 1150–52 (detailing history). The people of the State of Idaho even considered, and rejected, a constitutional amendment that would have added a right to privacy to the Idaho Constitution. *Id.* at ___, 522 P.3d 1152. Following the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), the State of Idaho enacted "trigger provisions" that would reimplement Idaho's abortion laws, which were then repealed, if such authority was returned to the States. *Id.* (citing

1973 Idaho Sess. Laws. 442, 448). These trigger provisions remained on Idaho's books for the next 17 years. *Id.* (citing 1990 Idaho Sess. Laws 446, 464).

Three decades after repealing the original trigger provisions, the Idaho Legislature again enacted a trigger provision through 2020 Idaho Senate Bill 1385. The bill's statement of purpose provided:

> This bill becomes effective when the United States Supreme Court restores to the states their authority to prohibit abortion, or the United States Constitution is amended to restore to the states their authority to prohibit abortion. Upon the occurrence of these prerequisites, this statute makes the performance of an abortion a crime. It provides affirmative defenses in the cases where the life of the mother is an issue and cases of rape and incest.

S.B. 1385, 65th Leg., 2d Reg. Sess., Statement of Purpose (Idaho 2020). The law, which was enacted at Idaho Code § 18-622, would take effect 30 days after States regained their right to prohibit abortion. Idaho Code § 18-622(1) (2020).

The 2020 version of Section 622 provided that a person who performed or attempted to perform an abortion, as then-defined in Idaho Code § 18-604(1), committed the crime of criminal abortion, a felony. Idaho Code § 18-622(2) (2020). For health care professionals, the act specified that they face a minimum six-month licensing suspension if they performed, attempted to perform, or assisted in performing or attempting to perform an abortion. *Id.* The law also provided an affirmative defense to prosecution and disciplinary action if proven by a preponderance of the evidence that (i) the physician determined in his or her good faith medical judgment based on the facts known to

the physician at the time that the "abortion was necessary to prevent the death of the pregnant woman," and (ii) the physician performed the abortion in the manner that provided the best opportunity for the unborn child to survive, unless such manner posed a greater risk of death to the woman. Idaho Code § 18-622(3)(a)(i)–(iii) (2020). The law provided another affirmative defense related to rape and incest. Idaho Code § 18-622(3)(b)(i)–(iii).

B. The Supreme Court Returns to States the Authority to Prohibit Abortion.

Two years after the codification of Idaho Code § 18-622, the Supreme Court issued its decision in *Dobbs*. The Court held that the United States Constitution does not confer a right to abortion, that *Roe* and *Casey* were wrongly decided and overruled, and that "the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 142 S. Ct. at 2279. The Supreme Court further held that States "may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'"[1] *Id.* at 2283–84 (citations omitted). The

[1] The Supreme Court identified the following non-exhaustive list of legitimate interests:

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

Dobbs, 142 S. Ct. at 2284 (citations omitted).

Court emphasized the importance of this judicial respect, which "applies even when the laws at issue concern matters of great social significance and moral substance." *Id.* at 2284 (citations omitted).

C. The Biden Administration Works to Counteract *Dobbs*.

On the day the Supreme Court released its *Dobbs* decision, President Biden denounced the Court's decision but recognized his administration's limitations under the law. *Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade*, THE WHITE HOUSE (June 24, 2022) (cited below at 3-StateER-229).[2] He proclaimed that "[t]his fall, *Roe* is on the ballot," and he called on Americans to "elect more state leaders to protect [abortion] at the local level." *Id.* While he lamented the decision, he acknowledged that women in "a large swath of the land" are "liv[ing] in a state that restricts abortion." *Id.* And he admitted that Congress "must act" and the people "have the final word"—not his administration. *Id.*

But two weeks later, the President abandoned his democratic stance and issued an executive order directing the Department of Health and Human Services to find a way to federalize the issue of abortion. *Protecting Access to Reproductive Healthcare Services*, Exec. Order No. 14076, 87 Fed. Reg. 42053-54 (July 8, 2022) (cited below at 3-StateER-

[2] https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/06/24/remarks-by-president-biden-on-the-supreme-court-decision-to-overturn-roe-v-wade/

229).[3] Specifically, the order required HHS to consider updates to guidance regarding emergency conditions and stabilizing care. The Centers for Medicare and Medicaid Services then released guidance positing that the Emergency Medical Treatment and Labor Act preempts any state law prohibiting abortion but not including "an exception for the life and health of the pregnant person." *Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss*, CENTERS FOR MEDICARE & MEDICAID SERVICES (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-Hospitals.pdf (last visited July 31, 2023) (cited below at 3-StateER-230); *see also* Letter to Health Care Providers, SECRETARY OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf (last visited July 31, 2023) (cited below at 3-StateER-230).

D. The Emergency Medical Treatment and Labor Act.

Nearly 40 years ago, Congress enacted EMTALA. It did so because it was "concerned that hospitals were dumping patients who were unable to pay for care, either by refusing to provide emergency treatment to these patients, or by transferring the patients to other hospitals before the patients' conditions stabilized." *Jackson v. East Bay Hosp.*, 246 F.3d 1248, 1254 (9th Cir. 2001) (citing H.R. Rep. No. 241, 99th Cong., 1st Sess., Part I, at 27 (1985), reprinted in 1986 U.S.C.C.A.N. 579, 605). As this Court has recognized, the Act is "commonly known as the 'Patient Anti-Dumping Act.'" *Id.*

[3] https://www.federalregister.gov/documents/2022/07/13/2022-15138/protecting-access-to-reproductive-healthcare-services

The Act imposes various obligations on a Medicare-participating hospital emergency department. *Id.* First, the Act imposes a threshold screening requirement for patients presenting to emergency departments with an emergency medical condition. In that case, the hospital "must provide for an appropriate medical screening examination within the capability of the hospital's emergency department . . . to determine whether or not an emergency medical condition . . . exists." 42 U.S.C. § 1395dd(a); *Jackson*, 246 F.3d at 1254. This is how the Act defines an emergency medical condition:

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

42 U.S.C. § 1395dd(e)(1); *Jackson*, 246 F.3d at 1254.

Second, when a hospital detects an emergency medical condition, it must provide stabilizing treatment or an appropriate transfer. Importantly, a hospital's treatment

obligations are, sensibly, limited to the hospital's capabilities. In the words of the Act, "the hospital must provide either (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or (B) for transfer of the individual to another medical facility." 42 U.S.C. § 1395dd(b)(1); *Jackson*, 246 F.3d at 1254.

Regarding stabilizing care, the Act defines "to stabilize" as follows:

> The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

42 U.S.C. § 1395dd(e)(3)(A). This definition is noteworthy because it contains the only place EMTALA sets forth a specific stabilizing treatment. In the case of an unborn child, EMTALA requires a hospital to deliver the child, including the placenta. EMTALA does not demand any other specific stabilizing treatments.

A transfer of a patient with an emergency medical condition must be appropriate as specified under the Act. A transfer is appropriate where the person requests a transfer or the physician signs a certification that "the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer." *Id.* § 1395dd(c)(1); *Jackson*, 246 F.3d at 1254.

E. The United States Sues Idaho and Seeks a Preliminary Injunction.

Three weeks after the Centers for Medicare and Medicaid Services guidance was issued, the United States sued the State of Idaho. 3-StateER-369-85. It sought declaratory relief that Idaho Code § 18-622 "violates the Supremacy Clause and is preempted to the extent it is contrary to EMTALA." 3-StateER-383. It also asked for an injunction before the law was set to take effect. 3-StateER-288-316; *see also* 3-StateER-317-68 (certain declarations supporting its motion).

Immediately following the United States' preliminary injunction motion, Idaho's Legislature moved to intervene. 3-StateER-409 (docket entry 15). The district court granted the Idaho Legislature's motion to intervene for the limited purpose of submitting factual evidence in opposition to that preliminary injunction, ordering that the State could not duplicate those efforts. 3-StateER-286–87. The Idaho Legislature and the State then separately opposed the preliminary injunction motion.[4]

F. The District Court Enjoins Idaho Code § 18-622.

Three weeks after the United States filed its complaint, and just two days after the district court heard argument on the preliminary injunction motion, the court preliminarily enjoined Idaho Code § 18-622. 1-StateER-014–52. The district court held that it was impossible to comply with EMTALA and Idaho law. 1-StateER-032. The district

[4] The Idaho Legislature separately appeals the district court's denial of its motion for leave to intervene and an appeal over the grant of the preliminary injunction motion. The latter has been consolidated with this case. *See* Dkt. 9. The former, which is Appeal No. 23-35153, is pending. This brief does not address that appeal.

court was most troubled by the statute's affirmative defense because, in its view, "EMTALA requires abortions that the affirmative defense would not cover." 1-StateER-033. The court further reasoned that Section 622 stood as an obstacle to EMTALA's "clear purpose," which it identified as "establish[ing] a bare minimum of emergency care that would be available to all people in Medicare-funded hospitals." 1-StateER-038. Again, it was concerned about the "uncertain scope of the affirmative defense," and it also worried that Section 622's life-saving carve out imposed a "medically impossible" standard and forced doctors to withhold care the court believed EMTALA required. 1-StateER-040, 042 (alteration in original). The State of Idaho and the Idaho Legislature each promptly sought reconsideration. 3-StateER-146–78; *see also* 3-StateER-418 (docket entry 97).

G. After the Idaho Supreme Court Clarified the Scope Idaho Code § 18-622, Idaho Moved the District Court to Reconsider Its Order, which It Denied.

While the motions for reconsideration were pending, the Idaho Supreme Court issued its decision in a state-law challenge to Idaho Code § 18-622 and a related law not at issue here, the Fetal Heartbeat Preborn Child Protection Act, Idaho Code §§ 18-8801–8808. In its *Planned Parenthood Great Nw.* decision, the Idaho Supreme Court held that Idaho Code § 18-622 was not unconstitutional under the Idaho Constitution. *Planned Parenthood Great Nw.*, 171 Idaho at ___, 522 P.3d at 1161–215. The Court addressed as part of its analysis the meaning of "necessary to prevent the death of the pregnant woman." *Id.* at ___, 522 P.3d at 1203–04. And the Idaho Supreme Court

determined that the termination of non-viable and ectopic pregnancies was not an abortion. *Id.* at ___, 522 P.3d at 1202–03. Because the district court's interpretation of Section 622 could no longer stand given the Idaho Supreme Court's authoritative interpretation of the statute, the State of Idaho moved to submit supplemental briefing supporting the motions for reconsideration. 3-StateER-419 (docket entry 119); 3-StateER-135-45.

Nevertheless, the district court denied the motions to reconsider. It concluded that neither the reasons presented in the "initial round of briefing," nor the Idaho Supreme Court's decision warranted reconsideration. 1-StateER-006–07. The court invited the State of Idaho and the Idaho Legislature to appeal so that "the law lords of the Ninth Circuit reach a judgment." 1-StateER-012. Both the State of Idaho and Idaho Legislature timely appealed.

H. During the Pendency of this Appeal, House Bill 374 Amended Section 622.

During the 2023 legislative session, the Idaho Legislature enacted House Bill 374. House Bill 374 amended the definition of abortion in Idaho Code § 18-604(1)—which in turn amended the scope of Section 622. The definition of abortion now excludes the removal of a dead unborn child, the removal of an ectopic or molar pregnancy, and treatment of a woman who is no longer pregnant. *See* Addendum at 11. House Bill 374 further eliminated the affirmative defense and replaced it with an exception. Now under Section 622, an abortion that is necessary to prevent the death of a pregnant woman is

not considered a criminal abortion. *Id.* The Defense of Life Act, as the law is titled, took effect on July 1, 2023, after the notice of appeal had been filed by the State.

SUMMARY OF THE ARGUMENT

The United States advances a preemption theory that it has cut out of whole cloth. In EMTALA's nearly 40-year history, no one thought it mandated abortion care—that is, not until the United States sought a way around *Dobbs*. Congress enacted EMTALA to address patient dumping. That is how this Court and every court to address the statute have uniformly understood its purpose. That purpose matters because federal law cannot be read expansively beyond its purpose to preempt state law. Here, the United States' theory not only depends on an expansive, never-before-adopted reading of EMTALA, but it also requires this Court to ignore EMTALA's plain text.

The United States seeks extraordinary relief, and so it rightly bears a heavy burden. In addition to that already stringent standard, this Court's precedent makes preemption by EMTALA even more difficult. Courts must construe EMTALA's "preemptive effect as narrowly as possible." *Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993). Under those controlling standards, the United States' preemption claim fails.

First, compliance with both laws is not impossible. The United States' theory requires hospitals to staff emergency departments with doctors willing to perform abortions, but EMTALA only requires hospitals to offer treatments that are available. In Idaho, the abortions the United States vies for are not available to any patient.

Second, Idaho law is not an obstacle to accomplishing EMTALA's purposes. EMTALA is an anti-patient dumping statute. Congress did not intend to establish a national minimum standard of care.

The remaining *Winter* factors support the State. The district court based its irreparable harm determination on its erroneous understanding that EMTALA mandates abortions. The United States could not show irreparable harm from the State of Idaho simply exercising its recently re-confirmed authority to regulate abortion. And because there is no violation of the Supremacy Clause to prevent, the public interest and balance of equities support Idaho's position.

STANDARD OF REVIEW

When a district court issues a preliminary injunction on "faulty legal premises," the injunction must be vacated. *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 483 (9th Cir. 2023) (reversing grant of preliminary injunction). An injunction will not stand unless the district court "got the law right." *Id.* at 491. Accordingly, this Court reviews the district court's conclusions of law de novo. *Id.* It reviews the other terms of the preliminary injunction for an abuse of discretion. *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002). "An abuse of discretion will be found if the district court based its decision on an erroneous legal standard or clearly erroneous finding of fact." *Petrick*, 68 F.4th at 491 (citation omitted).

A preliminary injunction is an "extraordinary remedy." *California v. Azar*, 950 F.3d 1067, 1105 (9th Cir. 2020) (*citing Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22

(2008)). It "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." The showing here required the United States to establish the familiar *Winter* factors: "(1) it is likely to prevail on the merits of its substantive claims, (2) it is likely to suffer imminent, irreparable harm absent an injunction, (3) the balance of equities favors an injunction, and (4) an injunction is in the public interest." *Petrick*, 68 F.4th at 490 (citing *Winter*, 555 U.S. at 20). Since the party opposing the preliminary injunction is a state government, the third and fourth *Winter* factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Although it was not argued nor applied below, this Court will also consider a sliding-scale approach to the traditional test. An injunction may issue under that approach when the plaintiff establishes there are "serious questions going to the merits" and the balance of hardship "tips sharply toward the plaintiff"—of course, the other two *Winter* factors must still be met. *All. for the Wild Rockies* at 490–91. Under either approach, "[l]ikelihood of success on the merits is a threshold inquiry and the most important factor." *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1080 (9th Cir. 2020).

This Court applies the same standard of review to the district court's decision denying the State's motion for reconsideration. The Court reviews de novo any legal conclusion on which the denial was based. *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 965–66 n.3 (9th Cir. 2016). It reviews the remaining aspects of the district court's denial for an abuse of discretion. *Id.* A motion to reconsider should be granted where the district court "committed clear error or the initial decision was manifestly unjust" or where

"there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted).

ARGUMENT

The United States' attempt to use EMTALA as a bludgeon against States exercising traditional police powers is an incursion on the democratic norms that hold our Union together. It is also an unprecedented manipulation of a Medicare law intended to prevent patient dumping. The United States' true aim is to circumvent the Supreme Court's decision in *Dobbs*. But its policy objections to Idaho law regulating matters of Idaho concern are precisely what the Supreme Court's presumption against preemption is intended to protect against. The United States is not entitled to an extraordinary remedy—particularly not in this area of special State concern.

I. The United States Is Not Likely To Show That EMTALA Preempts Idaho Code § 18-622.

The United States' novel preemption argument runs into strong headwinds on multiple fronts. First, as a general matter, "[t]here is a strong presumption against finding that state law is preempted by federal law." *Committee of Dental Amalgam Man. v. Stratton*, 92 F.3d 807, 811 (9th Cir. 1996). Second, as to Idaho Code § 18-622, "the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cleaned up). And third, as to EMTALA, it contains a savings clause, so its preemptive effect is construed "as narrowly as possible." *Draper*, 9 F.3d at 1393.

The savings clause "demonstrates that one of Congress's objectives was that EMTALA would peacefully coexist with applicable state 'requirements.'" *Hardy v. New York City Health & Hosp. Corp.*, 164 F.3d 789, 795 (2d Cir. 1999). Accordingly, EMTALA will only preempt state law that makes compliance with EMTALA impossible or that stands as an obstacle to the accomplishment of its full purposes. *Draper*, 9 F.3d at 1393.

These preemption principles have been repeated by this Court often. But none of them show up in the district court's analysis—the court did not even cite them. Its order is inconsistent with the "strong presumption" against preemption and this Court's directive to construe EMTALA's preemptive effect "as narrowly as possible." It also does not accord Idaho "great latitude under [its] police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons"—as this Court also requires. *Committee of Dental Amalgam Man. v. Stratton*, 92 F.3d 807, 811 (9th Cir. 1996).

The preemption framework that applies here leaves the United States' claim with bald tires. There is no direct conflict. EMTALA does not mandate abortions, and Idaho law does not prohibit life-saving care to pregnant mothers. Full stop. So it is not impossible for emergency departments and doctors to comply with both EMTALA and Idaho Code § 18-622. Nor is Idaho law any obstacle to EMTALA's anti-dumping protections. Success on the merits is far from likely.

A. Compliance with EMTALA and Idaho Code § 18-622 is not physically impossible.

The United States thinks that EMTALA requires emergency departments to perform abortions for stabilizing treatment. The district court accepted that novel premise and held that Idaho Code § 18-622 makes it impossible to comply with EMTALA's supposed abortion mandate. *See* 1-StateER-007 (citing 1-StateER-032). It defies the plain language of the Act, balloons federal authority over traditional State powers, and makes a mockery of Supreme Court precedent.

The Statutory Text. EMTALA and Idaho law can peacefully coexist: even if the statute were construed to mandate hospitals' choice to accept federal funding and be subject to the law, EMTALA's provisions pose no impossibility conflict with Idaho law. The Defense of Life Act generally makes abortion illegal in Idaho. But it includes two important provisos: (1) the removal of a dead, unborn child and the removal of an ectopic or molar pregnancy is not an "abortion" under the Act, Idaho Code § 18-604(1), and (2) an abortion is not prohibited if a doctor believes—"in his good faith medical judgment and based on the facts known to [him] at the time"—that it is "necessary to prevent the death of the pregnant woman." Idaho Code § 18-622(2)(a). EMTALA does not mandate abortions beyond those permitted by Idaho law for several reasons.

First, an emergency department is only required to provide stabilizing treatment that is "available at the hospital." 42 U.S.C. § 1395dd(b)(1)(A); *see also Baker v. Adventist Health, Inc.*, 260 F.3d 987, 993–95 (9th Cir. 2001) (rejecting claim that hospital had to

provide care beyond its capabilities). In Idaho, elective abortions generally are not available to anyone at any hospital. And EMTALA does not force hospitals to offer specific procedures beyond their capabilities. *See Baker*, 260 F.3d at 993–95; *Leimbach v. Hawaii Pac. Health*, No. 14-00246-JMS-RLP, 2015 WL 4488384, at *10 (D. Haw. July 22, 2015) ("EMTALA does not impose liability on hospitals for failing to provide medical procedures outside their emergency department's capacity."); Richard A. Epstein, *Living Dangerously: A Defense of Mortal Peril*, 1998 UNIV. ILL. L. REV. 909, 929–30 (1998) ("EMTALA does not require any hospital to establish an ED, but it does require that all 'available' facilities be used to discharge its obligation"); American Health Lawyers Association, *Public Interest Session: After the Catastrophe: Disaster Relief, AHLA-PAPERS P03220618*, § A. EMTALA (Mar. 22, 2006) ("EMTALA does not require hospitals to provide more or different care than they otherwise would, but they cannot provide less."). Abortion is no exception.

But the United States' position is that hospitals with emergency departments *must* provide abortion services. Under its theory, then, a hospital is required to staff its emergency departments with doctors willing to perform abortions. That claim has already been rejected by this Court. In *Baker*, the plaintiff contended that EMTALA required a 40-bed rural hospital to offer psychiatric treatment. *Baker*, 260 F.3d at 991. The hospital operated an emergency room but did not offer psychiatric treatment and had no psychiatrists, psychologists, or any other mental health professionals on staff. *Id.* The Court

held that forcing a hospital to provide treatment beyond its capability was "not a tenable position under the statute." *Id.* at 993. The United States' position is just as untenable.

The common-sense point that EMTALA does not force emergency departments to establish a minimum roster of services offered is further confirmed by the structure of the Act. When an individual presents with an "emergency medical condition," a hospital may either provide stabilizing treatment at its facility or it may make an "appropriate transfer" to another medical facility. 42 U.S.C. § 1395dd(b), (c). A transfer is "appropriate" once "the transferring hospital provides the medical treatment within its capacity transfer which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child." *Id.* § 1395dd(c)(2)(A). In other words, EMTALA contemplates differing levels of care across emergency departments. *Baker*, 260 F.3d at 995 ("EMTALA explicitly recognizes the differences among the capabilities of hospital emergency rooms"). And it does not attempt to alter the reality that some hospitals do not offer certain services.

EMTALA's implementing regulations and this Court's decision in *Brooker v. Desert Hospital Corp.*, 947 F.2d 412, 415 (9th Cir. 1991), underscore the issue with the United States' argument. Nothing in EMTALA mandates specific treatment. *See also Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253 (1999) (per curiam) ("But there is no question that the text of § 1395dd(b) does not require an 'appropriate' stabilization."). The regulations confirm that EMTALA does not impose specific treatment requirements, and, in fact, a hospital is not required to make treatments available that are not

offered generally. Rather, a hospital need only provide stabilizing treatment "[w]ithin the capabilities of the staff and facilities available." 42 C.F.R. § 489.24(d)(i). That limitation explains the outcome in *Brooker*, where a patient claimed that EMTALA required the hospital to provide her with specific treatment to stabilize her condition. But the Court said just the opposite: "The Act did not require the hospital to perform angioplasty or bypass surgery [before transfer]." *Brooker*, 947 F.2d at 415.

Second, what the United States is really arguing is that EMTALA establishes a national standard of care. In its view, abortion is the only way to treat pregnant women presenting with certain conditions. But EMTALA "was not enacted to establish a federal medical malpractice cause of action nor to establish a national standard of care." *Bryant v. Adventist Health System/West*, 289 F.3d 1162, 1166 (9th Cir. 2002); *see also Harry v. Marchant*, 291 F.3d 767, 773 (11th Cir. 2002) (en banc) ("EMTALA was not intended to establish guidelines for patient care."). It instead prevents hospitals from withholding treatment from patients that is comparable to treatment it offers other patients—particularly paying patients. *See Jackson v. East Bay Hosp.*, 246 F.3d 1248, 1256 (9th Cir. 2001). As Judge Richard S. Arnold explained, "[p]atients are entitled under EMTALA, not to correct or non-negligent treatment in all circumstances, but to be treated as other similarly situated patients are treated, within the hospital's capabilities." *Summers v. Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1138 (8th Cir. 1996) (en banc) (cited by *Bryant* and *Jackson*). Idaho law does not force hospitals to withhold treatment from pregnant women that it offers to other patients, so there is no EMTALA issue.

Beyond its argument being expressly foreclosed by precedent, the United States employs faulty logic. The syllogism for its argument goes something like this:

> Major Premise: EMTALA requires emergency departments to provide individuals who have an emergency medical condition with stabilizing treatment.
>
> Minor Premise: Sometimes, abortions prohibited by Idaho law are the only treatment that can stabilize a pregnant woman's emergency medical condition.
>
> Conclusion: Thus, emergency departments must sometimes provide abortions that Idaho law prohibits.

The argument lacks both validity and soundness. The conclusion does not follow from the premises because an "individual" requiring stabilizing care under EMTALA includes a pregnant woman as well as her "unborn child." 42 U.S.C. § 1395dd(e)(1). EMTALA does not resolve how a hospital must treat pregnant women and unborn children, much less dictate that the only treatment option is to end the life of the unborn child. The major premise is incorrect because, as described above, it is not limited by an emergency department's capabilities. The minor premise is also incorrect because EMTALA does not dictate specific treatment requirements, so abortion is not the "only" treatment a hospital may employ to comply with the Act.

And third, even if EMTALA required hospitals to provide abortions, there is no gap between Idaho law and EMTALA's stabilization requirements.[5] Removing an

[5] If EMTALA required abortions beyond those permitted by Idaho law, as the United States contends, then EMTALA would require Medicaid to fund abortions barred by

ectopic pregnancy or a dead unborn child is not an abortion under Idaho law, and doctors do not need to obtain medical certainty before performing an abortion to prevent the death of a mother. The district court interpreted a previous version of the statute to say otherwise and concluded that the prior version conflicted with EMTALA because EMTALA requires hospitals to remove ectopic pregnancies and perform abortions when a patient could "reasonably be expected" to suffer injury. 1-StateER-034. The district court also thought the prior version's affirmative defense sets up a clear conflict with EMTALA. The current version of the statute (which controls) resolves each of the district court's concerns. *See Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974) ("We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision[.]"). It makes clear that Idaho law does not prohibit any abortion services that EMTALA requires, and it does not depend on proving an affirmative defense.

The only impossibility here is to find preemption while construing EMTALA's "preemptive effect as narrowly as possible." *See Draper*, 9 F.3d at 1393. EMTALA twice says that it does not preempt state law. 42 U.S.C. §§ 1395, 1395dd(f). And it nowhere

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the Hyde Amendment. "Under the Hyde Amendment—actually, a rider that Congress attaches to each year's appropriations legislation—federal funds (including Medicaid funds) may not be used to pay for abortions except in cases of danger to the life of the mother, rape, or incest." *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 964 (9th Cir. 2013).

imposes a standard of care or dictates how hospitals must treat emergency medical conditions. The Act's text rules out preemption here.

Principles of Federalism. The United States' claim is also inconsistent with bedrock principles of federalism. The district court's order opens the door for the United States to use EMTALA to regulate the practice of medicine in ever-expanding ways. Right now, the Biden Administration is set on countering *Dobbs*, but the implications extend beyond abortion. For instance, the United States' theory, if correct, would give it the discretion to intervene in any number of complex policy questions regarding medical care, such as requiring hospitals to treat minor gender dysphoria with surgical removal of genitalia or to treat COVID-19 with ivermectin. It would have equal license to step in on hotly debated questions of medical utility and cost, such as by requiring hospitals to maintain state-of-the-art burn units or to treat fetal intrapericardial teratoma with the rare and complex resection surgery. EMTALA does not take the regulation of medicine from States and turn it over to the federal government. That is why it says "[n]othing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. § 1395.

Courts have also held over and over that EMTALA does not intrude on matters of traditional state regulation. Rather, it reflects a "consistent congressional policy against the involvement of federal personnel in medical treatment decisions." *United States v. Univ. Hosp., State Univ. of New York at Stony Brook*, 729 F.2d 144, 160 (2d Cir.

1984). And it "demonstrates Congress's intent to minimize federal intrusion into [areas of traditional state regulation]." *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 175 (1st Cir. 2009). EMTALA includes "a fairly straightforward message by Congress conceding state sovereignty over the issue of regulation [in the medical field]." *Downhour v. Somani*, 85 F.3d 261, 268 n.6 (6th Cir. 1996). The bottom line is that EMTALA "prohibits government action which interferes with the practice of medicine." *Am. Med. Ass'n v. Weinberger*, 522 F.2d 921, 925 (7th Cir. 1975) (interpreting 42 U.S.C. § 1395).

The United States wants to arm EMTALA with a combative force that it simply does not have. Congress enacted EMTALA with a limited, anti-dumping purpose. The Act does not go further and oust States from their traditional role regulating the practice of medicine, including abortion. Its reach is grounded in federalism, with Congress instructing courts not to "preempt any State or local law require," except in the narrowest of circumstances. 42 U.S.C. § 1395dd(f); *see also Draper,* 9 F.3d at 1393. The district court did not once acknowledge the "strong presumption" that federal law does not preempt state laws regulating health and safety; *Law v. General Motors Corp.*, 114 F.3d 908, 909–10 (9th Cir. 1997); or that the Act's preemptive effect is construed "as narrowly as possible"; *Draper,* 9 F.3d at 1393; or that Congress emphasized that "nothing" in the Act shall be construed to give the federal government "control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. § 1395. These

important principles of federalism are due more consideration. *General Motors Corp.*, 114 F.3d at 909–10 (noting the "importance of federalism in our constitutional structure").

Supreme Court Precedent. It also worth noting that the United States' preemption claim is an open assault on Supreme Court precedent. In June 2022, the Supreme Court held that "the authority to regulate abortion must be returned to the people and their elected representatives." *Dobbs*, 142 S. Ct. at 2279. Two weeks later, President Biden began trying to claw back that authority. He directed his Secretary of Health and Human Services to "identify[] potential actions . . . to protect and expand access to abortion [and to] identify[] steps to ensure that . . . pregnant women . . . receive the full protections for emergency medical care afforded under the law, including by considering updates to current guidance on obligations specific to emergency conditions and stabilizing care under the Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd." 87 Fed. Reg. 42,053 (July 8, 2022). Less than a month later, HHS and the Department of Justice sued Idaho.

This lawsuit is a bald-faced attempt to circumvent *Dobbs*. The Supreme Court could hardly have been clearer: it was returning the issue of abortion to the people and their elected representatives. *Dobbs*, 142 S. Ct. at 2279. EMTALA isn't a trump card that the Biden Administration can play to rebuild the *Roe* regime. For the nearly 40 years before *Dobbs*, no one thought Congress hid a right to abortion in a Medicare statute. Executive officials no more than courts can "substitute their social and economic beliefs for the judgment of legislative bodies." *Id.* at 2284 (citation omitted). The Court

should follow the holding in *Dobbs* and reject the United States' attempt to undermine the rule of law.

B. Idaho Code § 18-622 is not an obstacle to EMTALA.

The United States also contends that Idaho Code § 18-622 is an obstacle to Congress's purposes in enacting EMTALA, but this argument fares no better. The district court accepted that assertion, after it accepted the premise that EMTALA mandates abortions. 3-StateER-234. But as discussed above, EMTALA does not mandate abortions. And so, a state law defining the requirements pertaining to when an abortion may be performed and by whom—in line with the historic police powers of states—is no obstacle to a statute seeking to prevent patient dumping.

Right out of the chute, the district court's obstacle preemption analysis took a misstep. The court first had to establish the purposes and objectives of Congress in enacting EMTALA based on the text and structure of the Act. *Chamber of Commerce of United States v. Bonta*, 13 F.4th 766, 778 (9th Cir. 2021); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020) (citations omitted). This Court has addressed the purpose of EMTALA multiple times, holding the Act was adopted to prevent patient dumping or refusing to treat patients who are unable to pay. *E.g., Brooker v. Desert Hosp. Corp.*, 947 F.2d 412, 414 (9th Cir. 1991) (citing H.R. Rep. No. 241, 99th Cong., 2d Sess., 27, *reprinted in* 1986 U.S.C.C.A.N. 42, 605; Note, *Preventing Patient Dumping*, 61 N.Y.U. L. Rev. 1186, 1187–88 (1986)); *Draper*, 9 F.3d at 1393. This Court's decisions accord with other circuits. *E.g., Hardy*, 164 F.3d at

792; *Bryan v. Rectors & Visitors of Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996); *Marshall ex rel. Marshall v. East Carroll Parish Hosp.*, 134 F.3d 319, 322 (5th Cir. 1998); *Cherukuri v. Shalala*, 175 F.3d 446, 450 (6th Cir. 1999); *Martindale v. Indian Univ. Health Bloomington, Inc.*, 39 F.4th 416, 419, 423 (7th Cir. 2022); *Harry*, 291 F.3d at 772–73.

Instead of treading this Court's well-worn path to identifying anti-patient dumping as the primary purpose of EMTALA, the district court set off on its own circuitous route to determine statutory objectives. Following from its own novel holding that EMTALA mandates abortions, the court said, "Congress's clear purpose was to establish a bare minimum of emergency care that would be available to all people in Medicare-funded hospitals." 1-StateER-038. The district court cited *Arrington v. Wong*, 237 F.3d 1066, 1073–74 (9th Cir. 2001) to support its proposition, but the *Arrington* decision does not support that EMTALA establishes a national standard of care. This Court has held just the opposite. *Bryant*, 289 F.3d at 1166. The district court's holding to the contrary is wrong.

When EMTALA's limited purpose is the starting point, it is not difficult to see that Idaho Code § 18-622 poses no obstacle to prohibiting patient dumping. Section 622 identifies a uniform standard throughout Idaho for when an abortion may be performed, by whom, and under what circumstances. It does not direct that uninsured patients presenting to an emergency department be sent away without medical treatment. It does not direct that insured patients be treated differently than uninsured patients. Section 622 is an exercise by the State of a police power that *Dobbs* confirmed

belonged to the states to regulate abortion—States, not the federal government, regulate the practice of medicine, and that is true even under EMTALA. Idaho law "simply addresses a concern that the Act does not." *Draper*, 9 F.3d at 1393; *see also* 42 U.S.C. § 1395.

The district court, having erroneously understood EMTALA to provide a federal abortion mandate, thought Idaho Code § 18-622 would be an obstacle because it would deter physicians from providing abortions. But the fact that Section 622 regulates abortion and provides, in Idaho, a limited circumstance when an abortion may be performed, is not an obstacle to the requirements in EMTALA. The district court's concern that the regulation of abortion might deter EMTALA-mandated abortions was built on its faulty premise that EMTALA mandates abortions. It does not. The district court's concerns about the meaning of the affirmative defense were shown to be invalid. *Planned Parenthood Great Nw.*, 171 Idaho at ___, 522 P.3d at 1203–04. And any concern about the affirmative defense structure is now moot, given the enactment of House Bill 374.

The Court should again reject the United States' attempt to circumvent *Dobbs*. A state's regulation of abortion is no obstacle to the anti-patient dumping purposes of EMTALA.

C. The United States' interpretation of EMTALA would violate the Spending Clause and Anti-Commandeering Doctrine.

The State of Idaho raised below its assertions that the United States' interpretation of EMTALA would violate the Spending Clause and Anti-Commandeering Doctrine. 3-StateER-243, 161, 174–75. The Idaho Legislature has thoroughly argued these points in its brief on the consolidated appeal, Appeal No. 23-35450. Out of respect for the Court's time and to avoid duplicative briefing, the State of Idaho joins in the arguments made by the Idaho Legislature that the United States' interpretation of the EMTALA would violate the Spending Clause and Anti-Commandeering Doctrine.

* * * * *

EMTALA is a straightforward law with a clear and limited purpose. Congress enacted it to stop hospitals from "dumping" patients who were unable to pay. *James v. Sunrise Hosp.*, 86 F.3d 885, 887 (9th Cir. 1996). But there is zero evidence that Congress enacted EMTALA to mandate hospitals to offer abortion services. In fact, in 1989 Congress amended the statute—in four separate places—to require hospitals to protect the health of an "unborn child." Pub. L. No. 101-239, § 6211(h), 103 Stat. 2106, 2248 (1989). A fair reading—and certainly not the narrowest possible construction—of the statute does not lead to preemption of Idaho Code § 18-622. Because "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case," the United States is not likely to prevail on its preemption claim. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (cleaned up).

II. The United States Also Failed to Satisfy the Remaining *Winters* Factors.

The remaining *Winter* factors do not support the injunction either. Although this Court need not reach them, as the United States cannot show a likelihood of success—nor even serious questions going to the merits—the remaining *Winter* factors support the State's position. *Nat. Inst. of Family & Life Advs. v. Harris*, 839 F.3d 823, 845 n.11 (9th Cir. 2016). Given the district court's errors of law, it abused its discretion.

Irreparable harm. The State of Idaho, not the United States, is being irreparably harmed. It cannot enforce its valid law. The district court thought Idaho Code § 18-622 injected "tremendous uncertainty into precisely what care is required (and permitted for pregnant patients who present in Medicare-funded emergency rooms with emergency medical conditions." 1-StateER-048. But this was based on its erroneous interpretation of EMTALA. The United States could not show irreparable harm as there is no right to abortion in the Act, nor has a right ever been found to exist since its 1986 enactment. EMTALA cannot now be read to fill the constitutional gap created by *Roe*'s reversal and *Dobbs*'s holding that the power to regulate abortions is one that was returned to the states. And, consistent with *Dobbs*, Idaho Code § 18-622 defines within Idaho when abortions are authorized and under what circumstances a physician may perform an abortion. *See Planned Parenthood Great Nw.*, 171 Idaho at ___, 522 P.3d at 1202–05. Such regulation does not present irreparable harm to the United States or other parties.

The United States also unduly delayed pursuing preemption. Idaho law has long prohibited abortions that the United States says are not required by EMTALA. Before

Section 622 controlled the question, the version of Idaho Code § 18-608 passed in 1973 prohibited third-trimester abortions unless to save the mother's life. But the United States has never claimed *that* version of the law conflicted with EMTALA's supposed abortion mandate. And it is no answer to say that there was no need for EMTALA's preemption because of *Roe*. The United States has not argued that its understanding of EMTALA is coextensive with *Roe*. Accordingly, this over-three-decade delay implies a lack of urgency and irreparable injury. *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). Finally, the United States' burden on showing irreparable injury was not subject to this Court's lesser standard for showing irreparable harm from constitutional injuries, *see Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019), as the question the United States raised is whether 42 U.S.C. § 1395dd(f) preempts Idaho Code § 18-622.

Balance of equities and public interest. The equities favor permitting enforcement of Idaho's valid law. The district court reasoned that preventing a violation of the Supremacy Clause served the public interest. 1-StateER-049. Yet there is no violation of the Supremacy Clause. Further, the district court's concern with "doctors feel[ing] hobbled by an Idaho law," 1-StateER-049–50, was again based on its supposition that EMTALA mandates abortion and on a prior version of the Section 622. Any question about the meaning of the law and its necessary-to-prevent-the-death exception was put to bed by the Idaho Supreme Court's binding analysis and the subsequent amendment to the statute. *See Planned Parenthood Great Nw.*, 171 Idaho at ___, 522 P.3d

at 1202–05. The district court's further concern with the affirmative defense structure, 1-StateER-050, was also addressed by the Idaho Supreme Court and House Bill 374. Finally, the district court's concern about supposed impacts on other State's emergency rooms, 1-StateER-050, failed to acknowledge what *Dobbs* said just months before: that the U.S. Constitution permits each state to regulate abortion as it sees fit.

The district court erred in not permitting Idaho to enforce the law enacted by its people. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation omitted)). That members of the public—including physicians—may have divergent views on the policy behind the law is no reason to grant a preliminary injunction. Consistent with *Dobbs*, the balance of equities and public interest lie in allowing Idaho to lawmake for themselves. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (citation omitted)).

III. At the Very Least, the District Court's Preliminary Injunction Must Be Significantly Narrowed to Reflect EMTALA's Language.

Not only did the district court have no basis to issue the injunction, it erred by entering an overbroad injunction. Injunctive relief must "be tailored to remedy the specific harm alleged." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (citations omitted). The harm alleged by the United States is tied to the obligation

on hospitals to stabilize a patient presenting to the emergency department with an emergency medical condition. *See* 3-StateER-378.

The district court's injunction says it enjoins Idaho from enforcing Idaho Code § 18-622(2)–(3) "as applied to medical care required" by EMTALA. 1-StateER-051. But the next sentence prohibits Idaho from taking certain actions against

> any medical provider or hospital based on their performance of conduct that (1) is defined as an "abortion" under Idaho Code § 18-604(1), *but that is necessary to avoid* (i) "placing the health of" a pregnant patient "in serious jeopardy"; (ii) a "serious impairment to bodily functions" of the pregnant patient; or (iii) a "serious dysfunction of any bodily organ or part" of the pregnant patient, pursuant to 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii).

Id. at 1-StateER-052 (emphasis added). The three categories at the end of the injunction are from the definition of an emergency medical condition. *See* 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii). The district court thus enjoined Idaho from enforcing its law where the abortion was *necessary to avoid* an emergency medical condition.

This necessary-to-avoid standard does not align with EMTALA's definition of stabilizing treatment. Under the Act, "to stabilize" means to provide "such medical treatment of the condition *as may be necessary to assure*, within reasonable medical probability, *that no material deterioration of the condition is likely* to result from or occur during the transfer of the individual from a facility." 42 U.S.C. § 1395dd(e)(3)(A) (emphasis added). The Act uses a necessary-to-assure-no-material-deterioration standard and applies that to patients that present with an existing emergency medical condition. This is different

than, and much narrower than, the necessary-to-avoid an emergency medical condition standard adopted by the district court.

The district court's injunction is also overbroad because it grants facial relief when the United States did not meet its burden for a facial challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). The relief the district court granted via the injunction is not specific to the United States; rather, it prohibits Idaho from enforcing Idaho Code § 18-622 against hospitals and medical professionals in *every* circumstance subject to EMTALA. *See* 1-StateER-051–52.

The United States has strongly opposed being subjected to the facial challenge standard. But even if the United States' complaint had aspects of an as-applied challenge, the Supreme Court's holding in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), leaves no doubt that the United States was still subject to the standard governing facial challenges: it plainly sought—and the district court plainly enjoined—Idaho law from having any application to anyone inconsistent with its view of EMTALA, so the injunction applied more broadly than a particular circumstance involving the United States. *Id.* at 194 (requiring the facial challenge standard because "plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs"). Here, the United States has not met the demanding facial challenge standard. The district

court thus erred, even after the State re-raised the issue on reconsideration, in not crafting the injunction to the United States alone and as-applied to a particular situation.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand, vacating the district court's preliminary injunction.

Respectfully submitted,

August 7, 2023.

HON. RAÚL R. LABRADOR
Attorney General

s/ *Joshua N. Turner*
JOSHUA N. TURNER
Deputy Solicitor General
LINCOLN DAVIS WILSON
Chief, Civil Litigation and
Constitutional Defense Division
BRIAN V. CHURCH
Deputy Attorney General

Attorneys for Appellant

STATEMENT OF RELATED CASES

The undersigned attorney or self-represented party states the following:

I am aware of one or more related cases currently pending in this Court. The case number and name of each related case and its relationship to this case are:

Related case 1

Appeal No. 23-35153, *United States v. State of Idaho*

Appellants: The Idaho Legislature

Appellee: United States of America

This appeal was brought by the Idaho Legislature, who was granted limited intervention in district court proceeding, challenging the denial of its renewed motion to intervene.

Related case 2

Appeal No. 23-35450, *United States v. State of Idaho*

Appellant: The Idaho Legislature

Appellee: United States of America

This appeal was consolidated with the State's appeal. It also challenges the district court's grant of the preliminary injunction and denial of reconsideration.

s/ *Joshua N. Turner* August 7, 2023

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Circuit Case No.: 23-35440 (consolidated with 23-35450)

I am the attorney representing Appellant.

This brief contains 9671 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

s/ *Joshua N. Turner* August 7, 2023

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing/attached documents on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Description of Documents: Appellant's Opening Brief

s/ *Joshua N. Turner* August 7, 2023