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

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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.

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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

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

ADDENDUM TO STATE OF IDAHO'S OPENING BRIEF

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Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)

42 U.S.C.A. § 1395

§ 1395. Prohibition against any Federal interference

Currentness

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

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XVIII, § 1801, as added Pub.L. 89-97, Title I, § 102(a), July 30, 1965, 79 Stat. 291.)

Notes of Decisions (67)

42 U.S.C.A. § 1395, 42 USCA § 1395
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)
Part E. Miscellaneous Provisions (Refs & Annos)

42 U.S.C.A. § 1395dd

§ 1395dd. Examination and treatment for emergency medical conditions and women in labor

Effective: December 27, 2020
Currentness

(a) Medical screening requirement

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor

(1) In general

If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either--

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c).

(2) Refusal to consent to treatment

A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual's behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) Refusal to consent to transfer

A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such transfer, but the individual (or a person acting on the individual's behalf) refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) Restricting transfers until individual stabilized

(1) Rule

If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B)), the hospital may not transfer the individual unless--

(A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1395x(r)(1) of this title) has signed a certification that [1] based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1395x(r)(1) of this title), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the risks and benefits upon which the certification is based.

(2) Appropriate transfer

An appropriate transfer to a medical facility is a transfer--

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility--

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (d)(1)(C)) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) Enforcement

(1) Civil money penalties

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1320a-7a(a) of this title.

(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who--

(i) signs a certification under subsection (c)(1)(A) that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks, or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than $50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs. The provisions of section 1320a-7a of this title (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1320a-7a(a) of this title.

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1395cc(a)(1)(I) of this title) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) Financial loss to other medical facility

Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(C) Limitations on actions

No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) Consultation with quality improvement organizations

In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1) or in terminating a hospital's participation under this subchapter, the Secretary shall request the appropriate quality improvement organization (with a contract under part B of subchapter XI) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting a sanction under paragraph (1) and shall provide a period of at least 60 days for such review. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall also request such a review before making a compliance determination as part of the process of terminating a hospital's participation under this subchapter for violations related to the appropriateness of a medical screening examination, stabilizing treatment, or an appropriate transfer as required by this section, and shall provide a period of 5 days for such review. The Secretary shall provide a copy of the organization's report to the hospital or physician consistent with confidentiality requirements imposed on the organization under such part B.

(4) Notice upon closing an investigation

The Secretary shall establish a procedure to notify hospitals and physicians when an investigation under this section is closed.

(e) Definitions

In this section:

(1) The term "emergency medical condition" means--

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in--

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions--

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means a hospital that has entered into a provider agreement under section 1395cc of this title.

(3)(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, 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).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, 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), that the woman has delivered (including the placenta).

(4) The term "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a critical access hospital (as defined in section 1395x(mm)(1) of this title) and a rural emergency hospital (as defined in section 1395x(kkk)(2) of this title).

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) Nondiscrimination

A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) No delay in examination or treatment

A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) or further medical examination and treatment required under subsection (b) in order to inquire about the individual's method of payment or insurance status.

(i) Whistleblower protections

A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XVIII, § 1867, as added Pub.L. 99-272, Title IX, § 9121(b), Apr. 7, 1986, 100 Stat. 164; amended Pub.L. 99-509, Title IX, § 9307(c)(4), Oct. 21, 1986, 100 Stat. 1996; Pub.L. 99-514, Title XVIII, § 1895(b)(4), Oct. 22, 1986, 100 Stat. 2933; Pub.L. 100-203, Title IV, § 4009(a)(1), formerly § 4009(a)(1), (2), Dec. 22, 1987, 101 Stat. 1330-56, 1330-57; renumbered and amended Pub.L. 100-360, Title IV, § 411(b)(8)(A)(i), July 1, 1988, 102 Stat. 772; Pub.L. 100-485, Title VI, § 608(d)(18)(E), Oct. 13, 1988, 102 Stat. 2419; Pub.L. 101-239, Title VI, §§ 6003(g)(3)(D)(xiv), 6211(a) to (h), Dec. 19, 1989, 103 Stat. 2154, 2245; Pub.L. 101-508, Title IV, §§ 4008(b)(1) to (3)(A), 4207(a)(1)(A), (2), (3), (k)(3), formerly 4027(a)(1)(A), (2), (3), (k)(3), Nov. 5, 1990, 104 Stat. 1388-44, 1388-117, 1388-124; renumbered and amended Pub.L. 103-432, Title I, § 160(d)(4), (5)(A), Oct. 31, 1994, 108 Stat. 4444; Pub.L. 105-33, Title IV, § 4201(c)(1), Aug. 5, 1997, 111 Stat. 373; Pub.L. 108-173, Title VII, § 736(a)(14), Title IX, § 944(b), (c)(1), Dec. 8, 2003, 117 Stat. 2355, 2423; Pub.L. 112-40, Title II, § 261(a)(3)(A), (E), Oct. 21, 2011, 125 Stat. 423; Pub.L. 116-260, Div. CC, Title I, § 125(b)(2)(B), Dec. 27, 2020, 134 Stat. 2966.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13952

<September 25, 2020, 85 F.R. 62187>

Protecting Vulnerable Newborn and Infant Children

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. Every infant born alive, no matter the circumstances of his or her birth, has the same dignity and the same rights as every other individual and is entitled to the same protections under Federal law. Such laws include the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd, which guarantees, in hospitals that have an emergency department, each individual's right to an appropriate medical screening examination and to either stabilizing treatment or an appropriate transfer. They also include section 504 of the Rehabilitation Act (Rehab Act), 29 U.S.C. 794, which prohibits discrimination against individuals with disabilities by programs and activities receiving Federal funding. In addition, the Born-Alive Infants Protection Act, 1 U.S.C. 8, makes clear that all infants born alive are individuals for purposes of these and other Federal laws and are therefore afforded the same legal protections as any other person. Together, these laws help protect infants born alive from discrimination in the provision of medical treatment, including infants who require emergency medical treatment, who are premature, or who are born with disabilities. Such infants are entitled to meaningful and non-discriminatory access to medical examination and services, with the consent of a parent or guardian, when they present at hospitals receiving Federal funds.

Despite these laws, some hospitals refuse the required medical screening examination and stabilizing treatment or otherwise do not provide potentially lifesaving medical treatment to extremely premature or disabled infants, even when parents plead for such treatment. Hospitals might refuse to provide treatment to extremely premature infants_born alive before 24 weeks of gestation_because they believe these infants may not survive, may have to live with long-term disabilities, or may have a quality-of-life deemed to be inadequate. Active treatment of extremely premature infants has, however, been shown to improve their survival rates. And the denial of such treatment, or discouragement of parents from seeking such treatment for their children, devalues the lives of these children and may violate Federal law.

Sec. 2. Policy. It is the policy of the United States to recognize the human dignity and inherent worth of every newborn or other infant child, regardless of prematurity or disability, and to ensure for each child due protection under the law.

Sec. 3. (a) The Secretary of Health and Human Services (Secretary) shall ensure that individuals responsible for all programs and activities under his jurisdiction that receive Federal funding are aware of their obligations toward infants, including premature infants or infants with disabilities, who have an emergency medical condition in need of stabilizing treatment, under EMTALA and section 504 of the Rehab Act, as interpreted consistent with the Born-Alive Infants Protection Act. In particular, the Secretary shall ensure that individuals responsible for such programs and activities are aware that they are not excused from complying with these obligations, including the obligation to provide an appropriate medical screening examination and stabilizing treatment or transfer, when extremely premature infants are born alive or infants are born with disabilities. The Secretary shall also ensure that individuals responsible for such programs and activities are aware that they may not unlawfully discourage parents from seeking medical treatment for their infant child solely because of their infant child's disability. The Secretary shall further ensure that individuals responsible for such programs and activities are aware of their obligations to provide stabilizing treatment that will allow the infant patients to be transferred to a more suitable facility if appropriate treatment is not possible at the initial location.

(b) The Secretary shall, as appropriate and consistent with applicable law, ensure that Federal funding disbursed by the Department of Health and Human Services is expended in full compliance with EMTALA and section 504 of the Rehab Act, as interpreted consistent with the Born-Alive Infants Protection Act, as reflected in the policy set forth in section 2 of this order.

(i) The Secretary shall, as appropriate and to the fullest extent permitted by law, investigate complaints of violations of applicable Federal laws with respect to infants born alive, including infants who have an emergency medical condition in need of stabilizing treatment or infants with disabilities whose parents seek medical treatment for their infants. The Secretary shall also clarify, in an easily understandable format, the process by which parents and hospital staff may submit such complaints for investigation under applicable Federal laws.

(ii) The Secretary shall take all appropriate enforcement action against individuals and organizations found through investigation to have violated applicable Federal laws, up to and including terminating Federal funding for non-compliant programs and activities.

(c) The Secretary shall, as appropriate and consistent with applicable law, prioritize the allocation of Department of Health and Human Services discretionary grant funding and National Institutes of Health research dollars for programs and activities conducting research to develop treatments that may improve survival_especially survival without impairment_of infants born alive, including premature infants or infants with disabilities, who have an emergency medical condition in need of stabilizing treatment.

(d) The Secretary shall, as appropriate and consistent with applicable law, prioritize the allocation of Department of Health and Human Services discretionary grant funding to programs and activities, including hospitals, that provide training to medical personnel regarding the provision of life-saving medical treatment to all infants born alive, including premature infants or infants with disabilities, who have an emergency medical condition in need of stabilizing treatment.

(e) The Secretary shall, as necessary and consistent with applicable law, issue such regulations or guidance as may be necessary to implement this order.

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

Notes of Decisions (569)

Footnotes

1 So in original. Probably should be followed by a comma.

42 U.S.C.A. § 1395dd, 42 USCA § 1395dd
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Prior Version Held Unconstitutional by Planned Parenthood of Idaho, Inc. v. Wasden, 9th Cir.(Idaho), July 16, 2004

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Idaho Code Annotated
Title 18. Crimes and Punishments
Chapter 6. Abortion and Contraceptives

I.C. § 18-604

§ 18-604. Definitions

Effective: July 1, 2023
Currentness

As used in this chapter:

(1) “Abortion” means the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean:

(a) The use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization, or the implantation of a fertilized ovum within the uterus;

(b) The removal of a dead unborn child;

(c) The removal of an ectopic or molar pregnancy; or

(d) The treatment of a woman who is no longer pregnant.

(2) “Department” means the Idaho department of health and welfare.

(3) “Down syndrome” means a chromosomal disorder associated either with an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21. Down syndrome is sometimes referred to as “trisomy 21.”

(4) “Emancipated” means any minor who has been married or is in active military service.

(5) “Fetus” and “unborn child.” Each term means an individual organism of the species Homo sapiens from fertilization until live birth.

(6) “First trimester of pregnancy” means the first thirteen (13) weeks of a pregnancy.

(7) “Hospital” means an acute care general hospital in this state, licensed as provided in chapter 13, title 39, Idaho Code.

(8) “Informed consent” means a voluntary and knowing decision to undergo a specific procedure or treatment. To be voluntary, the decision must be made freely after sufficient time for contemplation and without coercion by any person. To be knowing, the decision must be based on the physician's accurate and substantially complete explanation of:

(a) A description of any proposed treatment or procedure;

(b) Any reasonably foreseeable complications and risks to the patient from such procedure, including those related to reproductive health; and

(c) The manner in which such procedure and its foreseeable complications and risks compare with those of each readily available alternative to such procedure, including childbirth and adoption.

The physician must provide the information in terms that can be understood by the person making the decision, with consideration of age, level of maturity and intellectual capability.

(9) “Medical emergency” means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(10) “Minor” means a woman under eighteen (18) years of age.

(11) “Pregnant” and “pregnancy.” Each term shall mean the reproductive condition of having a developing fetus in the body and commences with fertilization.

(12) “Physician” means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(13) “Second trimester of pregnancy” means that portion of a pregnancy following the thirteenth week and preceding the point in time when the fetus becomes viable, and there is hereby created a legal presumption that the second trimester does not end before the commencement of the twenty-fifth week of pregnancy, upon which presumption any licensed physician may proceed in lawfully aborting a patient pursuant to section 18-608, Idaho Code, in which case the same shall be conclusive and unrebuttable in all civil or criminal proceedings.

(14) “Third trimester of pregnancy” means that portion of a pregnancy from and after the point in time when the fetus becomes viable.

(15) Any reference to a viable fetus shall be construed to mean a fetus potentially able to live outside the mother's womb, albeit with artificial aid.

Credits

Added by S.L. 1973, ch. 197, § 3. Amended by S.L. 2000, ch. 7, § 2; S.L. 2005, ch. 393, § 2; S.L. 2006, ch. 438, § 1, eff. July 1, 2006; S.L. 2021, ch. 258, § 1, eff. July 1, 2021; S.L. 2023, ch. 298, § 1, eff. July 1, 2023.

Notes of Decisions (6)

I.C. § 18-604, ID ST § 18-604

Statutes and Constitution are current with effective legislation through Chapters 1 to 314 of the First Regular Session of the Sixty-Seventh Idaho Legislature, which convened on Monday, January 9, 2023, and adjourned on Thursday, April 6, 2023. Some sections may be more current; see credits for details.

End of Document

West's Idaho Code Annotated
Title 18. Crimes and Punishments
Chapter 6. Abortion and Contraceptives

I.C. § 18-622

§ 18-622. Defense of life act

Effective: July 1, 2023
Currentness

(1) Except as provided in subsection (2) of this section, every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison. The professional license of any health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.

(2) The following shall not be considered criminal abortions for purposes of subsection (1) of this section:

(a) The abortion was performed or attempted by a physician as defined in this chapter and:

(i) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and

(ii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself; or

(b) The abortion was performed or attempted by a physician as defined in this chapter during the first trimester of pregnancy and:

(i) If the woman is not a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman has reported to a law enforcement agency that she is the victim of an act of rape or incest and provided a copy of such report

to the physician who is to perform the abortion. The copy of the report shall remain a confidential part of the woman's medical record subject to applicable privacy laws; or

(ii) If the woman is a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported to a law enforcement agency or child protective services that she is the victim of an act of rape or incest and a copy of such report has been provided to the physician who is to perform the abortion. The copy of the report shall remain a confidential part of the woman's medical record subject to applicable privacy laws.

(3) If a report concerning an act of rape or incest is made to a law enforcement agency or child protective services pursuant to subsection (2)(b) of this section, then the person who made the report shall, upon request, be entitled to receive a copy of such report within seventy-two (72) hours of the report being made, provided that the report may be redacted as necessary to avoid interference with an investigation.

(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

(5) Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.

Credits

Added by S.L. 2020, ch. 284, § 1, eff. July 1, 2020. Amended by S.L. 2023, ch. 298, § 2, eff. July 1, 2023.

Editors' Notes

VALIDITY

<For opinions denying requests to block the implementation and enforcement of this section, see Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, Kentucky v. State, Nos. 49615, 49817, & 49899, ___ P.3d ___, 2022 WL 3335696 (Idaho Aug. 12, 2022), and see Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, Kentucky v. State, Nos. 49615, 49817, & 49899, 171 Idaho 374, 522 P.3d 1132 (Jan. 5, 2023). For a memorandum decision and order granting a preliminary injunction enjoining the State of Idaho from enforcing subsecs. (2) and (3) [subsec. (1) as amended] of this section as applied to medical care required by the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, see U.S. v. Idaho, 623 F.Supp.3d 1096 (D. Idaho Aug. 24, 2022).>

Notes of Decisions (38)

I.C. § 18-622, ID ST § 18-622

Statutes and Constitution are current with effective legislation through Chapters 1 to 314 of the First Regular Session of the Sixty-Seventh Idaho Legislature, which convened on Monday, January 9, 2023, and adjourned on Thursday, April 6, 2023. Some sections may be more current; see credits for details.

End of Document

2021 Idaho Laws Ch. 258 (H.B. 302)

IDAHO 2021 SESSION LAWS

FIRST REGULAR SESSION OF THE 66TH LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

Ch. 258
H.B. No. 302

AN ACT RELATING TO ABORTION; AMENDING SECTION 18–604, IDAHO CODE, TO DEFINE A TERM AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 18–608, IDAHO CODE, TO REVISE A PROVISION REGARDING ABORTIONS DEEMED NOT TO BE UNLAWFUL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 18–609, IDAHO CODE, TO PROVIDE THAT CERTAIN PRINTED MATERIAL REGARDING DOWN SYNDROME BE MADE AVAILABLE TO PHYSICIANS, HOSPITALS, OR OTHER FACILITIES PROVIDING ABORTION AND ABORTION–RELATED SERVICES; AMENDING SECTION 18–613, IDAHO CODE, TO PROVIDE A CORRECT CODE REFERENCE AND TO MAKE TECHNICAL CORRECTIONS; AND AMENDING SECTION 18–617, IDAHO CODE, TO PROVIDE A CORRECT CODE REFERENCE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 18–604, Idaho Code, be, and the same is hereby amended to read as follows:

<< ID ST § 18–604 >>

§ 18–604. Definitions

As used in this act:

(1) “Abortion” means the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization or the implantation of a fertilized ovum within the uterus.

(2) “Department” means the Idaho department of health and welfare.

(3) **“Down syndrome” means a chromosomal disorder associated either with an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21. Down syndrome is sometimes referred to as “trisomy 21.”**

(4) “Emancipated” means any minor who has been married or is in active military service.

(~~4~~ **5**) “Fetus” and “unborn child.” Each term means an individual organism of the species ~~h~~ **H**omo sapiens from fertilization until live birth.

(~~5~~ **6**) “First trimester of pregnancy” means the first thirteen (13) weeks of a pregnancy.

(~~6~~ **7**) "Hospital" means an acute care~~,~~ general hospital in this state, licensed as provided in chapter 13, title 39, Idaho Code.

(~~7~~ **8**) "Informed consent" means a voluntary and knowing decision to undergo a specific procedure or treatment. To be voluntary, the decision must be made freely after sufficient time for contemplation and without coercion by any person. To be knowing, the decision must be based on the physician's accurate and substantially complete explanation of:

(a) A description of any proposed treatment or procedure;

(b) Any reasonably foreseeable complications and risks to the patient from such procedure, including those related to reproductive health; and

(c) The manner in which such procedure and its foreseeable complications and risks compare with those of each readily available alternative to such procedure, including childbirth and adoption.

The physician must provide the information in terms ~~which~~ **that** can be understood by the person making the decision, with consideration of age, level of maturity and intellectual capability.
(~~8~~ **9**) "Medical emergency" means a condition ~~which~~ **that**, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(~~9~~ **10**) "Minor" means a woman ~~less than~~ **under** eighteen (18) years of age.

(~~10~~ **1**) "Pregnant" and "pregnancy." Each term shall mean the reproductive condition of having a developing fetus in the body and commences with fertilization.

(~~11~~ **2**) "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(~~12~~ **3**) "Second trimester of pregnancy" means that portion of a pregnancy following the thirteenth week and preceding the point in time when the fetus becomes viable, and there is hereby created a legal presumption that the second trimester does not end before the commencement of the twenty-fifth week of pregnancy, upon which presumption any licensed physician may proceed in lawfully aborting a patient pursuant to section 18–608, Idaho Code, in which case the same shall be conclusive and unrebuttable in all civil or criminal proceedings.

(~~13~~ **4**) "Third trimester of pregnancy" means that portion of a pregnancy from and after the point in time when the fetus becomes viable.

(~~14~~ **5**) Any reference to a viable fetus shall be construed to mean a fetus potentially able to live outside the mother's womb, albeit with artificial aid.

SECTION 2. That Section 18–608, Idaho Code, be, and the same is hereby amended to read as follows:

<< ID ST § 18–608 >>

§ 18–608. Certain abortions permitted—Conditions and guidelines

The provisions of sections 18–605 and 18–606**, Idaho Code,** shall not apply to and neither this act~~,~~ nor other controlling rule of Idaho law~~,~~ shall be deemed to make unlawful an abortion performed by a physician if:

(1) When performed upon a woman who is in the first trimester of pregnancy, the same is performed following the attending physician's consultation with the pregnant patient and a determination by the physician that such abortion is appropriate in consideration of such factors as in his medical judgment he deems pertinent, including~~,~~ but not limited to physical, emotional, psychological and/or familial factors, ~~that the child would be born with some physical or mental defect,~~ that the pregnancy resulted from rape, incest or other felonious intercourse, and a legal presumption is hereby created that all illicit intercourse with a girl below the age of sixteen (16) **years** shall be deemed felonious for purposes of this section, the patient's age and any other consideration relevant to her well-being or directly or otherwise bearing on her health and, in addition to medically diagnosable matters, including but not limited to such factors as the potential stigma of unwed motherhood, the imminence of psychological harm or stress upon the mental and physical health of the patient, the potential stress upon all concerned of an unwanted child or a child brought into a family already unable, psychologically or otherwise, to care for it, and/or the opinion of the patient that maternity or additional offspring probably will force upon her a distressful life and future; the emotional or psychological consequences of not allowing the pregnancy to continue, and the aid and assistance available to the pregnant patient if the pregnancy is allowed to continue; provided, in consideration of all such factors, the physician may rely upon the statements of and the positions taken by the pregnant patient, and the physician shall not be deemed to have held himself out as possessing special expertise in such matters nor shall he be held liable, civilly or otherwise, on account of his good faith exercise of his medical judgment, whether or not influenced by any such nonmedical factors. Abortions permitted by this subsection shall only be lawful if and when performed in a hospital or in a physician's regular office or a clinic**,** which office or clinic is properly staffed and equipped for the performance of such procedures and respecting which the responsible physician or physicians have made satisfactory arrangements with one **(1)** or more acute care hospitals within reasonable proximity thereof providing for the prompt availability of hospital care as may be required due to complications or emergencies that might arise.

(2) When performed upon a woman who is in the second trimester of pregnancy, the same is performed in a hospital and is, in the judgment of the attending physician, in the best medical interest of such pregnant woman, considering those factors enumerated in subsection (1) of this section and such other factors as the physician deems pertinent.

(3) When performed upon a woman who is in the third trimester of pregnancy**,** the same is performed in a hospital and, in the judgment of the attending physician, corroborated by a like opinion of a consulting physician concurring therewith, either is necessary for the preservation of the life of such woman or, if not performed, such pregnancy would terminate in birth or delivery of a fetus unable to survive. Third-trimester abortions undertaken for preservation of the life of a pregnant patient, as permitted by this subsection, shall, consistent with accepted medical practice and with the well-being and safety of such patient, be performed in a manner consistent with preservation of any reasonable potential for survival of a viable fetus.

SECTION 3. That Section 18–609, Idaho Code, be, and the same is hereby amended to read as follows:

<< ID ST § 18–609 >>

§ 18–609. Physicians and hospitals not to incur civil liability—Consent to abortion—Notice

(1) Any physician may perform an abortion not prohibited by this act and any hospital or other facility described in section 18–608, Idaho Code, may provide facilities for such procedures without, in the absence of negligence, incurring civil liability therefor to any person including, but not limited to, the pregnant patient and the prospective father of the fetus to have been born in the absence of abortion, if informed consent for such abortion has been duly given by the pregnant patient.

(2) In order to provide assistance in assuring that the consent to an abortion is truly informed consent, the director of the department of health and welfare shall publish easily comprehended, nonmisleading and medically accurate printed material to be made available at no expense to physicians, hospitals or other facilities providing abortion and abortion-related services, and which shall contain the following:

(a) Descriptions of the services available to assist a woman through a pregnancy, at childbirth and while the child is dependent, including adoption services, a comprehensive list of the names, addresses, and telephone numbers of public and private agencies that provide such services and financial aid available;

(b) Descriptions of the physical characteristics of a normal fetus, described at two (2) week intervals, beginning with the fourth week and ending with the twenty-fourth week of development, accompanied by scientifically verified photographs of a fetus during such stages of development. The description shall include information about physiological and anatomical characteristics;

(c) Descriptions of the abortion procedures used in current medical practices at the various stages of growth of the fetus and any reasonable foreseeable complications and risks to the mother, including those related to subsequent childbearing;

(d) A list, compiled by the department of health and welfare, of health care providers, facilities and clinics that offer to perform ultrasounds free of charge and that have contacted the department annually with a request to be included in the list. The list shall be arranged geographically and shall include the name, address, hours of operation, telephone number and e-mail address of each entity;

(e) A statement that the patient has a right to view an ultrasound image and to observe the heartbeat monitoring of her unborn child and that she may obtain an ultrasound free of charge. The statement shall indicate that printed materials required by the provisions of this section contain a list, compiled by the department of health and welfare, of health care providers, facilities and clinics that offer to perform such ultrasounds free of charge; ~~and~~

(f) Information directing the patient where to obtain further information and assistance in locating a health care provider whom she can consult about chemical abortion, including the interventions, if any, that may affect the effectiveness or reversal of a chemical abortion, and informs the patient that if she wants to consult with such health care providers, she should contact those health care providers before she takes the abortifacient**; and**

(g) A section specific to unborn children diagnosed with Down syndrome in order to help educate mothers about the development of children with Down syndrome and the resources available in both the private and public sectors to assist parents of children with Down syndrome with the delivery and care of a child born with Down syndrome. The section shall include:

(i) Easily comprehended, medically accurate information regarding the development of a child with Down syndrome, including treatment and therapy strategies available during a pregnancy and after birth; and

(ii) Descriptions of the services available to assist Idaho families with children born with Down syndrome, including adoption services, support agencies, and organizations in both the public and private sectors. Such directory shall include the name, address, telephone number, website, and email address of agencies, ministries, and organizations that provide financial, medical, emotional, and spiritual support services to mothers and families with a child with Down syndrome.

The department shall ensure that a Spanish language version of the informed consent materials required in this subsection is made available to women considering an abortion.

(3)(a) The department of health and welfare shall develop and maintain a stable internet website, that may be part of an existing website, to provide the information described in subsection (2) of this section. No information regarding persons using the website shall be collected or maintained. The department of health and welfare shall monitor the website on a weekly basis to prevent and correct tampering.

(b) As used in this section, "stable internet website" means a website that, to the extent reasonably practicable, is safeguarded from having its content altered other than by the department of health and welfare.

(c) When a pregnant patient contacts a physician by telephone or visit and inquires about obtaining an abortion, the physician or the physician's agent before or while scheduling an abortion-related appointment must provide the woman with the address of the state-sponsored internet website on which the printed materials described in subsection (2) of this section may be viewed as required in subsection (2) of this section.

(4) Except in the case of a medical emergency, no abortion shall be performed unless, prior to the abortion, the attending physician or the attending physician's agent certifies in writing that the materials provided by the director have been provided to the pregnant patient at least twenty-four (24) hours before the performance of the abortion. If the materials are not available from the director of the department of health and welfare, no certification shall be required. The attending physician, or the attending physician's agent, shall provide any other information required under this act.

(5) Except in the case of medical emergency, no abortion shall be performed unless, prior to an initial consultation or any testing, and not less than twenty-four (24) hours prior to the performance of the abortion, the woman is informed by telephone or in person, by the physician who is to perform the abortion or by an agent of the physician, that ultrasound imaging and heartbeat monitoring are available to the woman enabling the pregnant woman to view her unborn child or observe the heartbeat of the unborn child. The physician or agent of the physician shall inform the pregnant woman that the website and printed materials described in subsection (2)(d), (e) and (f) of this section contain telephone numbers, addresses and e-mail addresses of facilities that offer such services at no cost. If the woman contacts the abortion facility by e-mail, the physician or agent of the physician shall inform the woman of the requirements of this subsection by e-mail with the required information in a larger font than the rest of the e-mail. No fee for an abortion shall be collected prior to providing the information required in this subsection.

(6) All physicians or their agents who use ultrasound equipment in the performance of an abortion shall inform the patient that she has the right to view the ultrasound image of her unborn child before an abortion is performed. If the patient requests to view the ultrasound image, she shall be allowed to view it before an abortion is performed. The physician or agent shall also offer to provide the patient with a physical picture of the ultrasound image of her unborn child prior to the performance of the abortion, and shall provide it if requested by the patient. In addition to providing the material, the attending physician may provide the pregnant patient with such other information which in the attending physician's judgment is relevant to the pregnant patient's decision as to whether to have the abortion or carry the pregnancy to term.

(7) Within thirty (30) days after performing any abortion without certification and delivery of the materials, the attending physician, or the attending physician's agent, shall cause to be delivered to the director of the department of health and welfare, a report signed by the attending physician, preserving the patient's anonymity, denoting the medical emergency that excused compliance with the duty to deliver the materials. The director of the department of health and welfare shall compile the information annually and report to the public the total number of abortions performed in the state where delivery of the materials was excused; provided that any information so reported shall not identify any physician or patient in any manner which would reveal their identities.

(8) If section 18–608(3), Idaho Code, applies to the abortion to be performed and the pregnant patient is an adult and for any reason unable to give a valid consent thereto, the requirement for that pregnant patient's consent shall be met as required by law for other medical or surgical procedures and shall be determined in consideration of the desires, interests and welfare of the pregnant patient.

(9) The knowing failure of the attending physician to perform any one (1) or more of the acts required under subsection (7) of this section or section 39–261, Idaho Code, is grounds for discipline pursuant to section 54–1814(6), Idaho Code, and shall subject the physician to assessment of a civil penalty of one hundred dollars ($100) for each month or portion thereof that each such failure continues, payable to the vital statistics unit of the department of health and welfare, but such failure shall not constitute a criminal act.

SECTION 4. That Section 18–613, Idaho Code, be, and the same is hereby amended to read as follows:

<< ID ST § 18–613 >>

§ 18–613. Partial-birth abortions prohibited

(1) Prohibited acts. Any physician who knowingly performs a partial-birth abortion and thereby kills a human fetus shall be subject to the penalties imposed in section 18–605, Idaho Code. This section shall not apply to partial-birth abortions necessary to save the life of the mother when her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) Definitions. As used in this section:

(a) "Fetus" has the same meaning as provided in section 18–604(4 **5**), Idaho Code.

(b) "Partial-birth abortion" means an abortion in which the person performing the abortion:

(i) Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother~~,~~ or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the physician knows will kill the partially delivered living fetus; and

(ii) Performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

(c) "Physician" has the same meaning provided in section 18–604, Idaho Code. However, any individual who is not a physician or not otherwise legally authorized by this state to perform abortions~~,~~ but who nevertheless directly performs a partial-birth abortion~~,~~ shall be subject to the provisions described in this section.

(3)(a) Civil actions. The father of the aborted fetus, if married to the mother of the aborted fetus at the time of the partial-birth abortion~~;~~ **,** or the maternal grandparents of the aborted fetus, if the mother is not at least eighteen (18) years of age at the time of the abortion, may bring a civil action against the defendant physician to obtain appropriate relief. Provided however, that a civil action by the father is barred if the pregnancy resulted from the father's criminal conduct or **if** the father consented to the abortion. Further, a civil action by the maternal grandparents is barred if the pregnancy is the result of a maternal grandparent's criminal conduct or **if** a maternal grandparent consented to the abortion.

(b) As used in this section, "appropriate relief" shall include:

(i) Money damages for all mental and physical injuries suffered by the plaintiff as a result of the abortion performed in violation of this section;

(ii) Money damages equal to three (3) times the cost of performing the abortion procedure.

(4)(a) Hearing. A physician accused of violating this section may request a hearing before the state board of medicine on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(b) The findings of the board of medicine regarding the issues described in paragraph (a) of this subsection are admissible at the criminal and civil trials of the defendant physician. Upon a motion by the defendant physician, the court shall delay the beginning of the criminal and civil trials for not more than thirty (30) days to permit the hearing to take place.

(5) Immunity. A woman upon whom a partial-birth abortion is performed shall not be prosecuted for violations of this section, for conspiracy to violate this section, or for violations of section 18–603, 18–605 or 18–606, Idaho Code, in regard to the partial-birth abortion performed.

SECTION 5. That Section 18–617, Idaho Code, be, and the same is hereby amended to read as follows:

<< ID ST § 18–617 >>

§ 18–617. Chemical abortions

(1) As used in this section:

(a) "Abortifacient" means mifepristone, misoprostol and/or other chemical or drug dispensed with the intent of causing an abortion as defined in section 18–604(1), Idaho Code. Nothing in the definition shall apply when used to treat ectopic pregnancy;

(b) "Chemical abortion" means the exclusive use of an abortifacient or combination of abortifacients to effect an abortion;

(c) "Physician" has the same meaning as provided in section 18–604(1~~+~~ **2**), Idaho Code.

(2) No physician shall give, sell, dispense, administer, prescribe or otherwise provide an abortifacient for the purpose of effecting a chemical abortion unless the physician:

(a) Has the ability to assess the duration of the pregnancy accurately in accordance with the applicable standard of care for medical practice in the state;

(b) Has determined, if clinically feasible, that the unborn child to be aborted is within the uterus and not ectopic;

(c) Has the ability to provide surgical intervention in cases of incomplete abortion or severe bleeding, or, if the physician does not have admitting privileges at a local hospital, has made and documented in the patient's medical record plans to provide such emergency care through other qualified physicians who have agreed in writing to provide such care;

(d) Informs the patient that she may need access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary, as a result of or in connection with the abortion procedure on a twenty-four (24) hour basis. If the appropriate medical facility is other than a local hospital emergency room, the physician shall provide the patient with the name, address and telephone number of such facility in writing; and

(e) Has complied with the informed consent provisions of section 18–609, Idaho Code.

(3) The physician inducing the abortion, or a person acting on behalf of the physician inducing the abortion, shall make reasonable efforts to ensure that the patient returns for a follow-up visit so that a physician can confirm that the pregnancy has been terminated and assess the patient's medical condition.

Approved April 20, 2021.
Effective: July 1, 2021.

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2020 Idaho Laws Ch. 284 (S.B. 1385)

IDAHO 2020 SESSION LAWS

SECOND REGULAR SESSION OF THE 65TH LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

Ch. 284
S.B. No. 1385

AN ACT RELATING TO ABORTION; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18–622, IDAHO CODE, TO PROVIDE AN EFFECTIVE DATE, TO PROVIDE FOR THE OFFENSE OF CRIMINAL ABORTION, TO PROVIDE PENALTIES, TO PROVIDE AFFIRMATIVE DEFENSES, AND TO PROVIDE EXCEPTIONS; AND PROVIDING SEVERABILITY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 6, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 18–622, Idaho Code, and to read as follows:

<< ID ST § 18–622 >>

§ 18–622. Criminal abortion

(1) Notwithstanding any other provision of law, this section shall become effective thirty (30) days following the occurrence of either of the following circumstances:

(a) The issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion; or

(b) Adoption of an amendment to the United States constitution that restores to the states their authority to prohibit abortion.

(2) Every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than (5) years in prison. The professional license of any health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.

(3) It shall be an affirmative defense to prosecution under subsection (2) of this section and to any disciplinary action by an applicable licensing authority, which must be proven by a preponderance of the evidence, that:

(a)(i) The abortion was performed or attempted by a physician as defined in this chapter;

(ii) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and

(iii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself; or

(b)(i) The abortion was performed or attempted by a physician as defined in this chapter;

(ii) If the woman is not a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion;

(iii) If the woman is a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported the act of rape or incest to a law enforcement agency or child protective services and a copy of such report has been provided to the physician who is to perform the abortion; and

(iv) The physician who performed the abortion complied with the requirements of paragraph (a)(iii) of this subsection regarding the method of abortion.

(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

(5) Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.

SECTION 2. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

Approved March 24, 2020.
Effective: July 1, 2020.

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LEGISLATURE OF THE STATE OF IDAHO
Sixty-seventh Legislature First Regular Session - 2023

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 374

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO ABORTION; AMENDING SECTION 18-604, IDAHO CODE, TO REVISE A DEFINITION AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 18-622, IDAHO CODE, TO REVISE THE SECTION CAPTION, TO REMOVE OBSOLETE LANGUAGE, TO PROVIDE THAT CERTAIN ABORTIONS AND ATTEMPTS ARE NOT CRIMINAL ABORTIONS, TO PROVIDE THAT CERTAIN PERSONS SHALL BE ENTITLED TO RECEIVE A CERTAIN REPORT UPON REQUEST AND TO MAKE A TECHNICAL CORRECTION; PROVIDING APPLICABILITY; AND DECLARING AN EMERGENCY AND PROVIDING AN EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 18-604, Idaho Code, be, and the same is hereby amended to read as follows:

18-604. DEFINITIONS. As used in this ~~act~~ chapter:

(1) "Abortion" means the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean ~~the~~:

(a) The use of an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization, or the implantation of a fertilized ovum within the uterus;

(b) The removal of a dead unborn child;

(c) The removal of an ectopic or molar pregnancy; or

(d) The treatment of a woman who is no longer pregnant.

(2) "Department" means the Idaho department of health and welfare.

(3) "Down syndrome" means a chromosomal disorder associated either with an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21. Down syndrome is sometimes referred to as "trisomy 21."

(4) "Emancipated" means any minor who has been married or is in active military service.

(5) "Fetus" and "unborn child." Each term means an individual organism of the species Homo sapiens from fertilization until live birth.

(6) "First trimester of pregnancy" means the first thirteen (13) weeks of a pregnancy.

(7) "Hospital" means an acute care general hospital in this state, licensed as provided in chapter 13, title 39, Idaho Code.

(8) "Informed consent" means a voluntary and knowing decision to undergo a specific procedure or treatment. To be voluntary, the decision must be made freely after sufficient time for contemplation and without coercion by any person. To be knowing, the decision must be based on the physician's accurate and substantially complete explanation of:

(a) A description of any proposed treatment or procedure;

(b) Any reasonably foreseeable complications and risks to the patient from such procedure, including those related to reproductive health; and

(c) The manner in which such procedure and its foreseeable complications and risks compare with those of each readily available alternative to such procedure, including childbirth and adoption.

The physician must provide the information in terms that can be understood by the person making the decision, with consideration of age, level of maturity and intellectual capability.

(9) "Medical emergency" means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

(10) "Minor" means a woman under eighteen (18) years of age.

(11) "Pregnant" and "pregnancy." Each term shall mean the reproductive condition of having a developing fetus in the body and commences with fertilization.

(12) "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state as provided in chapter 18, title 54, Idaho Code.

(13) "Second trimester of pregnancy" means that portion of a pregnancy following the thirteenth week and preceding the point in time when the fetus becomes viable, and there is hereby created a legal presumption that the second trimester does not end before the commencement of the twenty-fifth week of pregnancy, upon which presumption any licensed physician may proceed in lawfully aborting a patient pursuant to section 18-608, Idaho Code, in which case the same shall be conclusive and unrebuttable in all civil or criminal proceedings.

(14) "Third trimester of pregnancy" means that portion of a pregnancy from and after the point in time when the fetus becomes viable.

(15) Any reference to a viable fetus shall be construed to mean a fetus potentially able to live outside the mother's womb, albeit with artificial aid.

SECTION 2. That Section 18-622, Idaho Code, be, and the same is hereby amended to read as follows:

18-622. ~~CRIMINAL ABORTION~~ DEFENSE OF LIFE ACT. ~~(1) Notwithstanding any other provision of law, this section shall become effective thirty (30) days following the occurrence of either of the following circumstances:~~

~~(a) The issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion; or~~

~~(b) Adoption of an amendment to the United States constitution that restores to the states their authority to prohibit abortion.~~

~~(2) Every~~ (1) Except as provided in subsection (2) of this section, every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison. The professional license of any

health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.

~~(3) It shall be an affirmative defense to prosecution under subsection (2) of this section and to any disciplinary action by an applicable licensing authority, which must be proven by a preponderance of the evidence, that:~~

(2) The following shall not be considered criminal abortions for purposes of subsection (1) of this section:

(a) ~~(i)~~ The abortion was performed or attempted by a physician as defined in this chapter~~;~~ and:

~~(ii)~~ (i) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and

~~(iii)~~ (ii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself; or

(b) ~~(i)~~ The abortion was performed or attempted by a physician as defined in this chapter~~;~~ during the first trimester of pregnancy and:

~~(ii)~~ (i) If the woman is not a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman has reported ~~the act of rape or incest~~ to a law enforcement agency that she is the victim of an act of rape or incest and provided a copy of such report to the physician who is to perform the abortion~~;~~. The copy of the report shall remain a confidential part of the woman's medical record subject to applicable privacy laws; or

~~(iii)~~ (ii) If the woman is a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported ~~the act of rape or incest~~ to a law enforcement agency or child protective services that she is the victim of an act of rape or incest and a copy of such report has been provided to the physician who is to perform the abortion~~; and~~. The copy of the report shall remain a confidential part of the woman's medical record subject to applicable privacy laws.

~~(iv) The physician who performed the abortion complied with the requirements of paragraph (a)(iii) of this subsection regarding the method of abortion.~~

(3) If a report concerning an act of rape or incest is made to a law enforcement agency or child protective services pursuant to subsection (2)(b) of this section, then the person who made the report shall, upon request, be

entitled to receive a copy of such report within seventy-two (72) hours of the report being made, provided that the report may be redacted as necessary to avoid interference with an investigation.

(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

(5) Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.

SECTION 3. Section 2 of this act shall apply retroactively to any pending claim or defense, whether or not asserted, as of July 1, 2023.

SECTION 4. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after July 1, 2023.

STATEMENT OF PURPOSE

RS30769C1 / H0374

This legislation amends Idaho Code, Section 18-622 to clarify our existing definition of abortion and it eliminates the trigger provision and affirmative defense. The legislation also provides additional clarifying language regarding the reporting standard on rape and incest.

FISCAL NOTE

This legislation causes no additional expenditure of funds at the state or local level of government, nor does it cause an increase or decrease in revenue for state or local government. Therefore, the legislation has no fiscal impact.

Contact:

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LEGISLATURE OF THE STATE OF IDAHO
Sixty-fifth Legislature Second Regular Session - 2020

IN THE SENATE

SENATE BILL NO. 1385

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO ABORTION; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-622, IDAHO CODE, TO PROVIDE AN EFFECTIVE DATE, TO PROVIDE FOR THE OFFENSE OF CRIMINAL ABORTION, TO PROVIDE PENALTIES, TO PROVIDE AFFIRMATIVE DEFENSES, AND TO PROVIDE EXCEPTIONS; AND PROVIDING SEVERABILITY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 6, Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 18-622, Idaho Code, and to read as follows:

18-622. CRIMINAL ABORTION. (1) Notwithstanding any other provision of law, this section shall become effective thirty (30) days following the occurrence of either of the following circumstances:

(a) The issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion; or

(b) Adoption of an amendment to the United States constitution that restores to the states their authority to prohibit abortion.

(2) Every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than (5) years in prison. The professional license of any health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.

(3) It shall be an affirmative defense to prosecution under subsection (2) of this section and to any disciplinary action by an applicable licensing authority, which must be proven by a preponderance of the evidence, that:

(a)(i) The abortion was performed or attempted by a physician as defined in this chapter;

(ii) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and

(iii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good

faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself; or

(b)(i) The abortion was performed or attempted by a physician as defined in this chapter;

(ii) If the woman is not a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion;

(iii) If the woman is a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported the act of rape or incest to a law enforcement agency or child protective services and a copy of such report has been provided to the physician who is to perform the abortion; and

(iv) The physician who performed the abortion complied with the requirements of paragraph (a)(iii) of this subsection regarding the method of abortion.

(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

(5) Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.

SECTION 2. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

STATEMENT OF PURPOSE

RS27868 / S1385

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.

FISCAL NOTE

There is no fiscal impact to the state or general fund because this law becomes effective upon future action by the US Supreme Court or an amendment to the United States Constitution. Any future costs resulting from prosecution are dependent upon someone violating the law.

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