WENDY J. OLSON
Bar No. 7634
wendy.olson@stoel.com
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, ID 83702
Telephone: 208.389.9000

WENDY S. HEIPT
Admitted pro hac vice
wheipt@legalvoice.org
LEGAL VOICE
907 Pine Street, #500
Seattle, WA 98101
Telephone: 206.954.6798

KELLY O'NEILL, Bar No. 9303
koneill@legalvoice.org
LEGAL VOICE
P.O. Box 50201
Boise, ID 83705
Telephone: 208.649.4942

JAMILA A. JOHNSON
Admitted pro hac vice
jjohnson@lawyeringproject.org
LAWYERING PROJECT
900 Camp St., 3rd Floor, No. 1197
New Orleans, LA 70122
Telephone: 347.706.4981

PAIGE SUELZLE
Admitted pro hac vice
psuelzle@lawyeringproject.org
LAWYERING PROJECT
300 Lenora St., No. 1147
Seattle, WA 98121
Telephone: 347.515.6073

RONELLE TSHIELA
Admitted pro hac vice
rtshiela@lawyeringproject.org
LAWYERING PROJECT
1525 S. Willow St., Unit 17, No. 1156
Manchester, NH 03103
Telephone: 347.429.9834

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho,

Defendant.

Case No. 1:23-cv-00323-DKG

MEMORANDUM IN OPPOSITION TO DEFENDANT ATTORNEY GENERAL LABRADOR'S MOTION FOR CERTIFICATION OF QUESTION TO THE IDAHO SUPREME COURT [DKT 138]

I. INTRODUCTION

After nearly three years of active litigation, rounds of briefing, an appellate argument, and a Ninth Circuit opinion resolving the scope of Idaho Code § 18-623's "recruiting" prong, Defendant Attorney General Raúl Labrador *now* moves to certify a question to the Idaho Supreme Court. The timing is not incidental. The Attorney General has lost on the recruiting issue before this Court and before the Ninth Circuit. He did not seek certification at either stage. He did not raise it during the preliminary injunction briefing, during the emergency stay proceedings, during the Ninth Circuit appeal, during the post-remand injunction briefing, or at any point in discovery. He raises it now, for the first time, in a motion filed at the same time as his motion for summary judgment filed three years into this case.[1]

The motion should be denied. Certification is a tool for resolving genuinely unsettled questions of widely applicable state law whose resolution would aid a federal district court. None of those conditions are satisfied here. The Ninth Circuit has already held that the "recruiting" prong of Idaho Code § 18-623 is facially overbroad under the First Amendment. The question the Attorney General seeks to certify is not "new" nor is it "unsettled." And a certified question would not "materially advance" this litigation — it would only delay it, to the prejudice of the Plaintiffs and the public interest. Certification does not exist to provide unhappy litigants with an additional appeal. The Attorney General's motion must be denied.

[11] Although the Attorney General's arguments in support of his Motion for Certification are set out in his Memorandum in Support of Attorney General's Motion for Summary Judgment (Dkt. 137-1), he has separately moved for certification. Dkt. 138. Accordingly, pursuant to Local Civil Rule 7.1(c), Plaintiffs are filing this memorandum of up to 20 pages in length in opposition.

II. BACKGROUND

In February 2023, Idaho Code § 18-623 was introduced in the Idaho Legislature as House Bill 242. *See* H.B. 242, 67th Leg., 1st Reg. Sess. (Idaho 2023). The bill passed quickly through both chambers, was signed by the Governor, and went into effect on May 5, 2023. Under Idaho Code § 18-623:

> (1) An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor, either procures an abortion, as described in section 18-604, Idaho Code, or obtains an abortion-inducing drug for the pregnant minor to use for an abortion by recruiting, harboring, or transporting the pregnant minor within this state commits the crime of abortion trafficking. As used in this subsection, the terms "procure" and "obtain" shall not include the providing of information regarding a health benefit plan.
>
> (2) It shall be an affirmative defense to a prosecution under subsection (1) of this section that a parent or guardian of the pregnant minor consented to trafficking of the minor.
>
> (3) It shall not be an affirmative defense to a prosecution under subsection (1) of this section that the abortion provider or the abortion-inducing drug provider is located in another state.
>
> (4) The Idaho attorney general has the authority, at the attorney general's sole discretion, to prosecute a person for a criminal violation of this section if the prosecuting attorney authorized to prosecute criminal violations of this section refuses to prosecute violations of any of the provisions of this section by any person without regard to the facts or circumstances.
>
> (5) Any person who commits the crime of abortion trafficking, as provided in subsection (1) of this section, shall be punished by imprisonment in the state prison for no less than two (2) years and no more than five (5) years.

On July 11, 2023, Plaintiffs Lourdes Matsumoto, the Northwest Abortion Access Fund ("NWAAF"), and the Indigenous Idaho Alliance ("IIA") (collectively "Plaintiffs") filed a lawsuit against Idaho Attorney General Raúl Labrador, asserting that Idaho Code § 18-623 is void for vagueness under the Fourteenth Amendment, infringes on their First Amendment rights to speak

and associate, and infringes on their rights to inter- and intrastate travel. Plaintiffs then moved to enjoin Idaho Code § 18-623 on their void-for-vagueness and First Amendment claims.[2] This court granted plaintiffs a preliminary injunction, and the Attorney General unsuccessfully moved to stay the injunction (Dkt. 44, *Motion to Stay Injunction Pending Appeal*, November 27, 2023) and then for an emergency appeal to the Ninth Circuit (Dkt. 23, *Rule 27-3 Emergency Motion for Stay Pending Appeal*, January 19, 2024). The Attorney General did not raise the issue of certification to the Idaho Supreme Court in either of these attempts.

The Attorney General then appealed this Court's granting of injunctive relief to the Ninth Circuit, without ever suggesting that certification to the Idaho Supreme Court was appropriate or necessary. This appeal directly involved the meaning and application of the words of Idaho Code § 18-623. Both parties submitted briefing, *amici* filed briefs, and the court held an oral argument on May 7, 2024. The Attorney General did not raise the issue of certification to the Idaho Supreme Court in any of the briefing or at the oral argument.

The Ninth Circuit affirmed the injunction in part and reversed it in part. *Matsumoto v. Labrador*, 122 F.4th 787, 816-17 (9th Cir. 2024). In its opinion, issued on December 2, 2024, the Ninth Circuit upheld the injunction as it relates to the "recruiting" portion of the statute. *Id.* at 816. In so doing, the panel applied standard tools of statutory construction — dictionary definitions, textual context, and the statute's internal structure — and explicitly considered the role of the specific intent element. *Id.* at 800-01, 805, 808, 811.

[2] In response, the Attorney General moved to dismiss Plaintiffs' claims. This Court dismissed only the claim that Idaho Code § 18-623 violated the right to intrastate travel and allowed all other claims to continue.

This case was then remanded to this Court for further proceedings, and both parties again submitted extensive briefing, specifically on the issue of what constitutes recruiting under Idaho Code § 18-623 in light of the Ninth Circuit's opinion. Significantly, in his briefing, the Attorney General did "not oppose the Plaintiffs' motion to modify the injunction to the extent that it would enjoin the Attorney General from enforcing the word "recruit" in Idaho Code § 18-623[.]" Dkt. 56, *Defendant's Response to Plaintiffs' Motion to Modify Injunction,* February 13, 2025. And again, the Attorney General did not raise the issue of certification to the Idaho Supreme Court. This Court issued its modified injunction over one year ago. Dkt. 58, *Order Modifying Preliminary Injunction*, March 7, 2025.

Both parties then engaged in extensive discovery, which involved propounding interrogatories and requests for admission and requests for production. The parties deposed fact witnesses, expert witnesses, and 30(b)(6) witnesses. This Court was called upon several times during discovery and issued two protective orders. At no time throughout the discovery process did the Attorney General raise the issue of certification to the Idaho Supreme Court.

After almost three years of active litigation, discovery is closed. Both parties have filed motions for summary judgment. Dkts. 136, 137. The issues are fully briefed. And with his motion for summary judgment, filed on April 16, 2026, the Attorney General, for the first time, has decided that the Idaho Supreme Court should weigh in on an issue on which the Attorney General has lost, several times, before two federal courts.[3]

[3] The Attorney General asks that the following question be certified: What does "recruiting" mean within the context of Idaho Code § 18-623(1) under Idaho law, including applicable Idaho canons of construction? Put another way, what is criminalized by the statute's prohibition on "procur[ing] an abortion . . . or obtain[ing] an abortion inducing drug for the pregnant minor to use for an abortion by recruiting . . . the pregnant minor within this state," with the "intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor"? Dkt. 138, *Attorney*

The standard for certifying a question from a United States District Court to a state supreme court are clear. The Attorney General does not meet these standards, and issues of delay, gamesmanship, and disregard for federalism further weigh against certification.

III. LEGAL STANDARD

"[I]f state law permits it, [the Court] may exercise [its] discretion to certify a question to the state's highest court." *Murray v. BEJ Mins., LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Idaho Appellate Rule 12.3 governs certification of a question of law from a United States District Court to the Idaho Supreme Court:

> **Certification of a question of law from a United States court**
>
> (a) **Certification of a Question of Law**. The Supreme Court of the United States, a Court of Appeals of the United States or a United States District Court may certify in writing to the Idaho Supreme Court a question of law asking for a declaratory judgment or decree adjudicating the Idaho law on such question if such court, on the court's own motion or upon the motion of any party, finds in a pending action that:
>
> (1) The question of law certified is a controlling question of law in the pending action in the United States court as to which there is no controlling precedent in the decisions of the Idaho Supreme Court, and
>
> (2) An immediate determination of the Idaho law with regard to the certified question would materially advance the orderly resolution of the litigation in the United States court.

I.A.R. 12.3.

In determining whether to exercise its discretion to certify a question to a state supreme court, district courts in the Ninth Circuit consider four factors: "(1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is

---

General Labrador's Motion for Certification of Question to the Idaho Supreme Court, April 16, 2026.

new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism." *High Country Paving, Inc. v. United Fire & Cas. Co.*, 14 F.4th 976, 978 (9th Cir. 2021) (internal quotation marks and citation omitted). "Additionally, a federal court may consider the timing of the certification, and whether certification will achieve savings to time, money, and resources or promote cooperative judicial federalism." *Van v. LLR, Inc.*, 562 F. Supp. 3d 1, 4 (D. Alaska 2021) (quoting *Carolina Cas. Ins. Co. v. McGhan*, 572 F. Supp. 2d 1222, 1226 (D. Nev. 2008)). The decision to certify or not certify a question to a state supreme court rests in the sound discretion of the district court. *Micomonaco v. Washington*, 45 F.3d 316, 322 (9th Cir. 1995) (citing *Lehman Bros.*, 416 U.S. at 391); *Schuler v. Battelle Energy All., LLC*, No. 4:18-CV-00234-CWD, 2019 WL 5295461, at *2 (D. Idaho Oct. 18, 2019).

Because invoking the discretion to certify a question is a decision that impacts both the orderly process of litigation that has been active for some time and has the ability to delay proceedings and undermine judicial federalism, it is not to be undertaken lightly. *Glacier Bear Retreat, LLC v. Dusek*, 107 F.4th 1049, 1052 (9th Cir. 2024) (noting with approval that certification to a state supreme court should only be undertaken "after careful consideration" (citation omitted)); *High Country Paving, Inc.*, 14 F.4th at 978 (noting that the certification process should not be invoked lightly and should be done only after careful consideration).

As explained below, none of the four factors in the *High Country* framework, nor issues of delay, prejudice, or federalism, support certification.

IV. ARGUMENT

The Attorney General's motion fails on every applicable standard. Certification to the Idaho Supreme Court in this case would be both unnecessary and untimely and would be prejudicial to both the Plaintiffs and to the administration of justice. The Attorney General is not

seeking to clarify an unsettled question of state law that might moot a federal question — he is seeking a more favorable answer to the same federal question from a different forum. The Attorney General passed over at least half a dozen distinct opportunities to seek certification over the past three years, none of the relevant factors of the Ninth Circuit's four-prong test weigh in his favor, and this case is not appropriately analyzed under the doctrine of constitutional avoidance. For all of these reasons, the Attorney General's motion should be denied.

A. *Certification Would Cause Undue Delay and Prejudice Plaintiffs*

The Attorney General meets none of the four factors considered by this Circuit when assessing whether to certify, and in this case additional factors weigh heavily against certification. Certification to the Idaho Supreme Court — which may decline to accept the question (*see* I.A.R. 12.3) would impose an indefinite and prejudicial delay on Plaintiffs, unfairly reward the Attorney General, and undercut the orderly process of federal litigation.

First, Plaintiffs, who have been seeking certainty about their legal exposure under Idaho Code § 18-623 for years, would be forced to wait even longer for a definitive ruling, which would prolong the chilling effect on protected speech.[4] That ongoing chilling effect, especially from a statute with criminal penalties, is itself a cognizable harm that weighs heavily against further delay. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Zwickler v. Koota*, 389 U.S. 241 (1967). This delay would also cut against the time saving aspect that certification is supposed to provide.

[4] Certifying the Attorney General's question would not end the inquiry. Even if the Idaho Supreme Court somehow found a narrowing construction in opposition to the Ninth Circuit, that decision would not bind the federal courts on whether the narrowed structure survives First Amendment scrutiny. In other words, there would be a further delay in the case, further prejudicing plaintiffs, while another federal constitutional determination is made. This would be in direct opposition to Idaho Appellate Rule 12.3's directive that certification should "materially advance" the litigation. I.A.R. 12.3(a)(2). This Court should not permit the Attorney General to postpone final adjudication of these important constitutional claims.

See Pranger v. Or. State Univ., No. 3:21-cv-00656-HZ, 2023 WL 111983, at *6 (D. Or. Jan. 4, 2023) (noting that saving time and resources are appropriate considerations in determining whether to certify a question to a state supreme court); *In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984), *amended and superseded on denial of rehearing by Churchill v. F/V Fjord*, 857 F.2d 571 (9th Cir. 1988).

Second, the Attorney General has waited almost three years, bypassing numerous opportunities where, while still unnecessary, certification would have been more sensible to seek. Indeed, over one year ago, he declined to oppose Plaintiffs' motion modifying the injunction enjoining him from enforcing the word "recruit." Dkt. 56, *Defendant's Response to Plaintiffs' Motion to Modify Injunction,* February 13, 2025. Certification does not exist to provide litigants the opportunity to change their mind and get an 'extra chance' to get the answer they want at whatever time they want it. As the Ninth Circuit has explained:

> We have long looked with disfavor upon motions to certify that are filed after the moving party has failed to avail itself of a prior opportunity to seek certification. For example, in states that accept certification from federal district courts (unlike California), we have a held that there is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision when the party that lost below did not mention the possibility of certification until after the district court entered summary judgment against it. Such requests for certification are generally inappropriate, we have held, because a party should not be allowed a second chance at victory through certification.

Hinojos v. Kohl's Corp., 718 F.3d 1098, 1108-09 (9th Cir. 2013) (citation modified), as *amended on denial of reh'g and suggestion of reh'g en banc* July 8, 2013; *see also Elward v. Sealy Inc.*, Nos. 23-4143, 23-4421, 2025 WL 1189502, at *2 (9th Cir. Apr. 24, 2025) ("There is also a strong presumption in the Ninth Circuit against certification where the party that lost below … did not seek certification until after an unfavorable ruling by the district court.").

Courts uniformly look with disfavor on litigants seeking to certify questions to state supreme courts who wait until after they have lost on an issue to do so because "[a]llowing parties to exploit certification as a de facto reconsideration or appeal would turn the district court's decision into nothing but a gamble." *Van*, 562 F. Supp. 3d at 4 (citation modified); *see also Or. Aero Inc. v. Navigators Ins. Co.*, No. 3:21-cv-01178-AN, 2025 WL 3254653, at *3 (D. Or. Nov. 21, 2025) (denying certification request on an issue that the Court had already decided); *Robertson v. GMAC Mortg. LLC*, No. C12-2017-MJP, 2013 WL 2351725, at *1 (W.D. Wash. May 30, 2013) (denying certification and noting that a state supreme court does not properly function as an appeals court when a litigant is unsatisfied); *In re Complaint of McLinn*, 744 F.2d at 681.

In this case, the Attorney General's request belies his gamesmanship--he seeks certification on only one of the three terms used in Idaho Code § 18-623--the only one where he disagrees with the Ninth Circuit's conclusion. As the *Schuler* Court observed, "there is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision. Consequently, after the district court issues its decision, the movant must demonstrate particularly compelling reasons why they should be allowed a second chance at victory." *Schuler*, 2019 WL 5295461, at *4 (citation modified); *see also Liquid Agents Healthcare, LLC v. Evanston Ins. Co.*, No. 1:20-cv-02225-CL, 2025 WL 914289, at *2 (D. Or. Mar. 26, 2025) ("Certification is presumed improper when the District Court issues an unfavorable opinion, and the losing party thereafter requests certification.").

In this case the Attorney General has done more than wait until after the District Court has weighed in – he has waited until after the District Court *and* the Ninth Circuit have weighed in. *See Miller v. Watson*, No. 3:18-cv-00562-SB, 2023 WL 3602791, at *5-6 (D. Or. May 23, 2023); *Van*, 562 F. Supp. 3d at 4 (noting that "there was no reason for defendants to wait until after the

parties and the court had devoted substantial time and resources to this issue" to seek certification). To allow certification here would reward the Attorney General for calendar gamesmanship and undercut the federal courts.

In sum, given the Attorney General's unjustified delay in seeking certification—moving for certification only after receiving adverse decisions from two levels of the federal judiciary—this Court should deny the Attorney General's motion for certification.

B. ***The Defendant Has Not Satisfied the Ninth Circuit Four-Factor Test for Certification.***

In this case, the Attorney General's timing, and the resulting prejudice to the Plaintiffs, the courts, and the public, weigh heavily against certification. Additionally, the Attorney General cannot satisfy any prong of the Ninth Circuit's four-prong test. This provides an independent basis to deny his motion.

1. The Proposed Certification Question Does Not Present an Unresolved and Important Public Policy Ramification

The Attorney General fails to identify how his proposed certification question presents an unresolved and important question of state public policy that would justify certification. Indeed, in support of the first prong of the four-factor inquiry, the Attorney General points to only one case: *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), which addressed an entirely different issue and says nothing about when certification to a state supreme court is appropriate, let alone whether this case presents important public policy ramifications unresolved by Idaho law.[5] In *CASA,* plaintiffs sought to enjoin an Executive Order on birthright citizenship. The single issue before the Supreme Court was one of remedy: whether, under the Judiciary Act of 1789, federal courts had the

[5] The Attorney General recognizes this, using "*cf.*" to designate the case, rather than identifying it as direct support.

equitable authority to issue universal injunctions. *See also Ass'n of Am. Univs. v. DOD*, 806 F. Supp. 3d 79, 123 (D. Mass. 2025) ("[T]he *CASA* Court was explicit that its decision concerned only 'a federal court's equitable authority under the Judiciary Act[.]'" (citation omitted)). But the Attorney General's reliance here is even more tenuous, as he points only to a parenthetical within *CASA*; even worse, that parenthetical is itself only to a quotation Chief Justice Roberts made in a *chambers opinion* in *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), a case involving a stay on appeal regarding whether DNA collection violated the Fourth Amendment.

It is unclear how this decision provides any support for the Attorney General's certification motion. At best, it is dicta within dicta. The Attorney General's lack of support makes clear that there is nothing left on this factor that certification can address.

2. The Proposed Certification Question Does Not Present a New and Substantial Issue of Broad Application

The Attorney General's argument on the second factor is contradictory and does not support certification. He seems to argue both that Idaho's canons of construction are unsettled enough to warrant certification and settled enough to predict that the Idaho Supreme Court would reach a different result. He further argues that this case presents an issue of broad application analogous to other cases that have allowed certification. The argument fails under any reading.

To the extent the Attorney General is arguing that Idaho's general canons of statutory construction are not well-established, he is in error. *State v. Olivas*, 158 Idaho 375, 379, 347 P.3d 1189, 1193 (2015); *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011). The defendant well knows that Idaho canons of construction are settled – he cites to two

cases that employ those canons -- *State v. Manzanares*, 152 Idaho 410, 272 P.3d 382 (2012), and *State v. Doe*, 148 Idaho 919, 231 P.3d 1016 (2010).

To the extent the Attorney General is contending Idaho's canons of construction would yield a different or narrower interpretation, he made his arguments on this point before this Court and before the Ninth Circuit and neither court was persuaded. Dkt 7.1, *Opening Br. of Appellant* (Dec. 20, 2023); Dkt. 32, *Def's Opp'n to Pls' Mot for a TRO or, in the Alternative, a Prelim. Inj.* (Aug. 28, 2023). Federal courts apply state law to new facts all the time without certifying a question to a state supreme court and well understand how to conduct such analyses. In its opinion, the Ninth Circuit refers repeatedly to the proper statutory construction and specifically notes that they are "[f]ollowing standard rules of statutory construction." *Matsumoto*, 122 F.4th at 808. The Court stated that "[t]he statute's coverage therefore depends upon the meaning of each of these words—recruiting, harboring, transporting—in the context of an adult procuring an abortion for a minor without parental consent. We follow the approach of the Supreme Court and this circuit to assess the scope and potential overbreadth of each term individually." *Id.* at 807; *see also United States v. Hansen*, 599 U.S. 762, 770 (2023); *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021). In short, certifying this question would do little more than give the Attorney General a second bite at an apple that the Ninth Circuit has already determined is out of his reach.

Nor is the Attorney General's motion for certification here analogous to cases where the district court has properly invoked certification to the Idaho Supreme Court. Cases appropriately certifying questions to the Idaho Supreme Court involve substantial issues of untested questions of broad application--far different from the facts here. For example, in *Blasch v. HP, Inc.*, No. 1:22-cv-00109-DKG, 2023 WL 10450307, at *8-9 (D. Idaho Apr. 18, 2023), the parties disagreed over the proper point of accrual analysis for wage discrimination claims under the Idaho Human

Rights Act, Idaho Code § 67-5901, *et seq.* and the Discriminatory Wage Rates Based Upon Sex Act, Idaho Code § 44-1701, *et seq*. Both parties agreed that there was no controlling Idaho law on the issue and the court, on its own motion, held that certification to the Idaho Supreme Court was appropriate. *Id.* at *2. The district court noted, *inter alia,* that the question at issue had been successfully certified in other states, was open to numerous resolutions all arguably supported by state law and was "purely a question of Idaho law and … dependent upon the interpretation of Idaho's human rights law and jurisprudence." *Id.* at *8.

Additionally, while the Attorney General asserts that certification is warranted because Idaho Code § 18-623 is a new statute that has never been applied, that rationale ignores that federal courts are well equipped to apply and analyze federal constitutional claims. *Foraker v. USAA Cas. Ins. Co.*, No. 3:14-cv-87-SI, 2019 WL 486177, at *3 (D. Or. Feb. 7, 2019). *cf. Exec. Risk Indem., Inc. v. Pac. Educ. Servs., Inc.*, 451 F. Supp. 2d 1147, 1151 (D. Haw. 2006) (denying certification where there was "sufficient state law" (citation omitted)); *Slidewaters LLC v. Wash. State Dep't of Lab. & Indus.*, 4 F.4th 747, 761 (9th Cir. 2021) (in a case involving abstention, the court noted that "resolution of a state law issue is uncertain when a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law" (citation modified)).

In sum, under the second factor, the Attorney General's proposed question for certification is not one that federal courts are ill-equipped to address or one that is of substantially broad application on a point of state law such that certification is appropriate. The second factor weights against certification.

3. Nothing in the Record Suggests That the Idaho Supreme Court is Seeking Questions of Certification

The Attorney General believes that the third factor, the Idaho Supreme Court's caseload, is "neutral insofar as counsel is aware." Attorney General Br. at 22. However, the available evidence weighs against certification.

There is nothing in the record to suggest that the Idaho Supreme Court's current caseload favors certification or that the Idaho Supreme Court would be able to rule on certified questions in a timely manner. *See Duffin v. Idaho State Univ.*, No. 4:16-cv-00209-BLW, 2017 WL 6543873, at *7 (D. Idaho Dec. 21, 2017) ("Moreover, the justices of the Idaho Supreme Court have recently informed this Court of their goal to issue decisions on questions certified to them on an expedited basis."). In fact, the opposite is true. In the 2026 State of the Judiciary address, Chief Justice G. Richard Bevan stated, "Our civil caseload has unexpectedly jumped the past two fiscal years. Our judges received nearly 93,000 new civil cases in FY25. That is a 17% increase from just two years before." G. Richard Bevan, Chief Justice, Idaho Supreme Court, State of the Judiciary Address (Jan. 21, 2026).

In short, this factor is not the "neutral" one the Attorney General alleges. Idaho's civil justice system is absorbing a surge in complexity and operating under budget constraints. Those impacts undoubtedly affect the Idaho Supreme Court as cases move up through the system. There is no reason to burden the Idaho Supreme Court with a question that cannot change the federal constitutional outcome.

4. Comity and Federalism Clearly Disfavor Certification in this Case

Finally, comity and federalism do not favor certification here — they counsel against it. *Hawthorne Sav. F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835, 852 (9th Cir. 2005) (noting that

comity is a doctrine of discretionary abstention), *amended*, 433 F.3d 1089 (9th Cir. 2006). Routing the same question to the Idaho Supreme Court after the federal courts have spoken clearly does not serve comity — it undermines the finality of federal judicial decisions. Nor does the Attorney General's assertion that "*The Idaho Supreme Court would take a different view of "recruiting" under Idaho law than the Ninth Circuit did under federal law"* find support in the law or in the facts of this case. The Attorney General points to no "clash between sovereigns" and no "tentative decisions." Attorney General Br. at 18.

First, a review of the Ninth Circuit's opinion clearly shows that this Court engaged in the appropriate analysis. *In re Complaint of McLinn*, 744 F.2d at 681 ("Ordinarily such a movant should not be allowed a second chance at victory when, as here, the district court employed a reasonable interpretation of state law."). Here, the Ninth Circuit assessed the scope of Idaho Code § 18-623 and applied canons of construction to individually assess the words "recruiting," "harboring," and "transporting." *Matsumoto*, 122 F.4th at 807. The court looked to relevant sources when evaluating the word "recruiting," including the statute at issue and other Idaho state statutes. *Id.* at 808. After laying out the plain meaning of the word "recruiting," the court then analyzed the scope of the word within the context of Idaho Code § 18-623. *Id.* at 808-09.

As part of its analysis, the court noted several factors singular to this statute. First, Idaho Code § 18-623 itself contains limiting language regarding information provided in relation to a health benefit plan, and that limitation implies that any other information can be subject to criminal penalties. *Id.* at 809. This canon of *expressio unius est exclusio alterius* is recognized by both Idaho and federal courts, and it undercuts the Attorney General's argument that the Idaho Supreme Court will give him the narrowing construction he seeks. *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006).

Second, while it may appear that recruiting done disconnected from procuring an abortion or an abortion-inducing drug for a minor is outside the purview of Idaho Code § 18-623, the Ninth Circuit recognized that any such scenario could be viewed as an attempt that would make the "recruiter" vulnerable to a criminal charge of aiding and abetting. *Matsumoto*, 122 F.4th at 811. Third, "[u]nder Section 18-623, the adult need only have 'the intent to conceal *an abortion*' from the parents. No similar intent to conceal applies to 'recruitment[.]'" *Id.* at 810.

In other words, the Ninth Circuit noted and addressed the relationship between "intent to conceal" and "recruiting" when analyzing the statute. The court clearly stated that it was looking at what the word recruiting meant and what conduct the intent to conceal applied to. The Attorney General may not agree with the result, but that does not mean the Ninth Circuit did not squarely address the issue.

Additionally, in support of his position, the Attorney General relies heavily on only two cases, *Doe*, 148 Idaho 919, 231 P.3d 1016, and *Manzanares*, 152 Idaho 410, 272 P.3d 382. Neither supports his premise that the Idaho Supreme Court would find in his favor where the federal courts have not.

In *Manzanares*, the defendant argued on appeal, *inter alia,* that Idaho Code § 18–8504(1)(a) (the "Recruiting Provision") was unconstitutionally overbroad on its face and as applied for encroaching on the First Amendment right to free association. *Manzanares*, 152 Idaho at 421, 272 P.3d at 393. Under the Recruiting Provision, "[a] person commits the offense of recruiting criminal gang members by ... [k]nowingly soliciting, inviting, encouraging or otherwise causing a person to actively participate in a criminal gang[.]" I.C. § 18-8504(1)(a). In holding that the provision was not overbroad, the Idaho Supreme Court recognized that in the provision at issue, unlike in Idaho Code § 18-623, the *mens rea* element was grammatically embedded within the

recruitment definition itself. *Manzanares*, 152 Idaho at 421, 272 P.3d at 393. Thus, the Idaho Supreme Court's methodology in *Manzanares* does not contradict the Ninth Circuit's approach in *Matsumoto*; it confirms it.

In *Doe*, a minor challenged a curfew ordinance, claiming it violated numerous constitutional guarantees. *Doe*, 148 Idaho at 923, 231 P.3d at 1020. He lost his challenge at the juvenile court and district court levels but prevailed before the Idaho Supreme Court. The language of the ordinance read:

> **A. NIGHT TIME CURFEW**: It shall be unlawful for any minor person under the age of eighteen (18) years to loiter, idle, wander, stroll, play, or otherwise be upon the public streets, highways, roads, sidewalks, alleys, parks, playgrounds, or other public grounds, or public places, building, or other property generally open to public use, or vacant lots within the City of Wendell, between the hours of 11:00 o'clock p.m. and 5:00 o'clock a.m.
>
> **B. EXCEPTIONS**: The provisions of this section do not apply to a minor accompanied by his or her parents or legal guardians, or where the minor is upon an emergency errand or other legitimate business directed by his or her parents or legal guardian or custodian or school, having in their possession some form of documentation as to the business to be performed.

Id.

Doe argued that the ordinance had "incidental effects on expressive conduct and innocent associations." *Id.* at 925, 231 P.3d at 1022. The Idaho Supreme Court, noting that "[t]he review of an ordinance varies depending on the type of conduct prohibited or criminalized by the enactment," *id.*, analyzed and rejected Doe's overbreadth argument under the test articulated by the United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968), *id.* at 926, 231 P.3d at 1023. Unlike the statute at issue in this case, the ordinance at issue in *Doe* was a local one that addressed the conduct of the actor, did not target a particular viewpoint, and had its exceptions integrated into the statute's prohibitions. In Idaho Code § 18-623, as the Ninth Circuit recognized, the instances where "recruitment" may be "speech integral to criminal conduct," reflect a small

subset of the protected speech covered within recruitment, *Matsumoto*, 122 F.4th at 814, which is categorically different from the conduct-focused curfew in *Doe*.

Both *Doe* and *Manzanares*, and the Ninth Circuit's analysis in *Matsumoto*, demonstrate that certification in the current case would not produce a different result; it would simply delay an inevitable one.

C. *The Attorney General's Constitutional Avoidance Argument Also Fails*

The Attorney General also attempts to prop up his case for certification by analogizing to the doctrine of constitutional avoidance.

While the Attorney General invokes the time-honored principle that courts should interpret statutes to avoid constitutional questions where possible, he misapplies that doctrine in this case. Constitutional avoidance supposes that a constitutional question can be avoided. *Clark v. Martinez*, 543 U.S. 371, 385 (2005). Here, almost three years have passed, and the constitutional question has been decided. The doctrine of constitutional avoidance is not a tool for undoing a decision a litigant finds unfavorable years after the court has decided.

The Attorney General relies solely on *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944), to support his constitutional avoidance argument. *Spector* is a Commerce Clause case that did not make that point at all and whose reach regarding constitutional avoidance has been distinguished. *See Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers."); *United States v. Shill*, 740 F.3d 1347, 1355 (9th Cir. 2014); *cf. Green v. Miss USA, LLC*, 52 F.4th 773 (9th Cir. 2022).

In short, the Attorney General's attempt to rely on constitutional avoidance to support his motion to certify an already decided question fails.

V. CONCLUSION

The Attorney General's motion to certify an already decided question to the Idaho Supreme Court, nearly three years after the litigation began, does not meet the Ninth Circuit standards for certification. The question the Attorney General seeks to certify does not present unresolved and important public policy ramifications, it is not new or of broad application, the state caseload and the spirit of comity and federalism both caution against it, and certification would reward the Attorney General for his unreasonable delay and prejudice the Plaintiffs. Because the Attorney General's motion to certify does not satisfy the requirements of Idaho Appellate Rule 12.3 or the Ninth Circuit's four-factor test, this Court should deny his motion.

DATED: May 7, 2026.

STOEL RIVES LLP

/s/ Wendy J. Olson
Wendy J. Olson

LEGAL VOICE

/s/ Wendy S. Heipt
Wendy S. Heipt
Kelly O'Neill

THE LAWYERING PROJECT

/s/ Jamila A. Johnson
Jamila A. Johnson
Paige Suelzle
Ronelle Tshiela

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 7, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

James E.M. Craig
james.craig@ag.idaho.gov

Aaron M. Green
aaron.green@ag.idaho.gov

Brian V. Church
brian.church@ag.idaho.gov

/s/ Wendy J. Olson
Wendy J. Olson