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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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

Plaintiff,

v.

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

Defendant.

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

REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF QUESTION TO THE IDAHO SUPREME COURT [Dkt. 138]

INTRODUCTION

Certification exists to reduce or remove potential clashes between federal and state sovereignty and is properly invoked here where a state attorney general seeks to eliminate an apparent clash between state law and the federal constitution.

Plaintiffs' narrow and partisan concerns about winning and losing take a back seat in a conversation between sovereigns. The appropriate question is whether the Idaho Supreme Court may adopt a state law construction of the word "recruiting" that eliminates the constitutional infirmity that the Ninth Circuit (applying federal rules of statutory interpretation under federal law) found in Idaho's abortion trafficking statute. The Attorney General, whose request is entitled to greater weight than a private party's request, *Arizonans for Official English v. Arizona.*, 520 U.S. 43, 76–78 & n.30 (1997), appropriately filed his motion at the summary judgment stage: where legal questions are rightly resolved, and where this Court has previously granted certification.

For the reasons set forth in the Attorney General's summary judgment motion, the Court should grant that motion because Plaintiffs lack standing and lack clean hands. Should the Court do so, this motion for certification becomes moot. However, should the Court instead decide to reach the merits of this case, then the Court should grant the motion for certification. Because "[f]ederal courts lack competence to rule definitively on the meaning of state legislation," the Court should invite the Idaho Supreme Court to apply Idaho methods of statutory interpretation before making a final determination about the "recruiting" prong of Idaho Code § 18-623. *Arizonans*, 520 U.S. at 48 (citation omitted).

ARGUMENT

The Attorney General's certification motion, Dkt. 138, Dkt. 137-1 at 24–31, satisfies the four-part test under Ninth Circuit precedent for certification and the factors identified by Idaho Appellate Rule 12.3. The Court should certify the question of what "'recruiting' mean[s] within

the context of Idaho Code § 18-623(1) under Idaho law, including applicable Idaho canons of construction?" Dkt. 138 at 2. The Idaho Supreme Court is the highest authority on Idaho law, including application of state canons of construction to state laws. *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

I. The Certification Motion satisfies the Ninth Circuit test for certification.

Plaintiffs contend the Attorney General's motion does not satisfy the certification factors. Dkt. 140 at 7–19. Not so. Courts in this circuit consider, "(1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.'" *Glacier Bear Retreat, LLC v. Dusek*, 107 F.4th 1049, 1052–53 (9th Cir. 2024) (citation omitted). Certification is not invoked "because a difficult legal issue is presented but because of deference to the state court on significant state law matters." *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003).

Importantly, the Ninth Circuit has:

> [N]oted, in reference to [*Arizonans*], that "we have an obligation to consider whether novel state-law questions should be certified—*and we have been admonished in the past for failing to do so*." *Parents Involved in Community Schools v. Seattle School District,* 294 F.3d 1085, 1086 (9th Cir.2002) (certifying question despite parties' unanimous request *not* to certify) . . . .

Kremen, 325 F.3d at 1037–38 (emphases added). The Ninth Circuit test supports certification here.

Public policy ramifications. Plaintiffs argue there is no important public policy question at issue. Dkt. 140 at 11–12. Yet the question of the scope of a state criminal statute—particularly where the scope determines if the state can enforce it—is undoubtably one with important public policy ramifications. *Doe v. Harris*, 640 F.3d 972, 974–75 (9th Cir. 2011) (certifying question on whether changes in criminal law will alter plea agreements); *see also Bellotti v. Baird*, 428 U.S. 132, 146–47, 150–51 (1976) (holding that district court should have abstained from enjoining

parental consent statute "pending construction of the statute" by state courts, and certifying question). A state suffers irreparable injury "any time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J. in chambers)); *see also, e.g.*, *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 167 F.4th 1247, 1258 (9th Cir. 2026). The State has no less an interest in its criminal law than it does in the scope of its tort law, or law of domicile, where the Supreme Court has directed certification. *McKesson v. Doe*, 592 U.S. 1 (2020) (per curiam) (tort law), *infra*; *Elkins v. Moreno*, 435 U.S. 647, 662 & n.16 (1978) (domicile).

New and substantial issue. Plaintiffs argue their case's challenge to Idaho Code § 18-623 is neither new nor substantial. Dkt. 140 at 12–14. But the issue is new: Idaho Code § 18-623 has never been interpreted by the Idaho Supreme Court. As Plaintiffs acknowledged to this Court, it is so new that no as-applied challenge can yet be brought. *See* Dkt. 143 at 9. The meaning of a criminal statute applicable statewide is substantial and a question of broad application. *See California ex rel. RoNo, LLC v. Altus Finance S.A.*, 344 F.3d 920, 925–26 (9th Cir. 2003) (certifying where the district court holding "implicat[ed] core sovereign interests" of a state by precluding attorney general from bringing claims). The application of Idaho canons of construction or a savings construction to Idaho Code § 18-623 is also new. The Ninth Circuit neither applied Idaho's canons to Idaho Code § 18-623,[1] nor predicted how the Idaho Supreme Court would rule.

Contrary to Plaintiffs' argument that courts "uniformly look with disfavor" on certification after legal development of the background federal question, Dkt. 140 at 10–11, 13, the fact that the Ninth Circuit has addressed the *federal* constitutional question does not make the statutory

[1] *Compare Matsumoto v. Labrador*, 122 F.4th 787, 807–08 (9th Cir. 2024), *with Nw. Ass'n of Indep. Schs. v. Labrador*, 166 F.4th 1148, 1159 (9th Cir. 2026) (applying state canons of construction).

interpretation question under *Idaho* law less new or less worthy of certification. The U.S. Supreme Court has repeatedly remanded for state-law certification after federal construction of that law. *E.g.*, *Arizonans*, 520 U.S. 43. Cited in the motion and unaddressed by Plaintiffs, *Arizonans* chided the Ninth Circuit and district court for failing to certify a question about the meaning of an amendment to the Arizona Constitution despite the requests of the Arizona Attorney General. *Id.* at 54–55. No matter that these courts found the Arizona Attorney General's position "unpersuasive" and "at odds with . . . plain language," the U.S. Supreme Court stated the request ought to have been granted out of deference to state executive understanding of state law, and the preeminent role of state courts in resolving state-federal conflict. *Id.* at 54–55, 76–79 & n.30.

In *Bellotti*, the Supreme Court expressly noted its contemporaneous ruling on a relevant issue of constitutional law and certified questions under the assumption that the state court would provide a constitutional construction. 428 U.S. at 147. The U.S. Supreme Court similarly directed certification in *McKesson*, where the circuit court decided a federal constitutional question, i.e., whether the scope of Louisiana's negligence doctrine violated the First Amendment, and in so doing, construed the scope of state tort law. Despite the circuit holding, the Court vacated and remanded the case for certification. *McKesson*, 592 U.S. at 6. While it was possible that the Louisiana Supreme Court might come to the same conclusion, and thus find the same conflict, the question of scope was "laden with value judgments and fraught with implications for First Amendment rights" and better suited for state court determination in the first instance. *Id.*

Here, the Ninth Circuit declined to predict how the Idaho Supreme Court would rule, declined to proffer a limiting construction,[2] and instead resorted to standard federal methods of

[2] Such constructions are the unique province of the Idaho Supreme Court in any event. *State v. Doe*, 148 Idaho 919, 933, 231 P.3d 1016, 1030 (2010).

interpretation to interpret the statute. Its federal constitutional analysis may guide the Idaho Supreme Court in drawing any constitutionally necessary construction—federal guidance which would not have been available before the Ninth Circuit opinion. *Cf. Tucson Women's Ctr. v. Ariz. Medical Bd.*, 666 F. Supp. 2d 1091, 1108–09 (D. Ariz. 2009) (ruling on statutory interpretation question but certifying identical question to state supreme court). However, ultimately the question here is also one "laden with value judgments" and First Amendment implications. *McKesson*, 592 U.S. at 6. Thus, certification to avoid conflict is proper.

State court caseload. The Idaho Supreme Court's caseload does not militate against certification.[3] Plaintiffs' cited authority, indicating that the Idaho Supreme Court's policy is to rule on questions certified on an expedited basis, demonstrates nothing about the current caseload of the Court. The fact that the Idaho Supreme Court would act with dispatch actually undermines any purported prejudice by delay. *Duffin v. Idaho State Univ.*, No. 4:16-cv-00209-BLW, 2017 WL 6543873 at *7 (D. Idaho Dec. 21, 2017). While Plaintiffs cite an overall increase in the Idaho state civil docket *at the trial court level*, they cite nothing to suggest the Idaho *Supreme Court* cannot take the certified question.[4] Dkt. 140 at 15. More to the point, this prong does not weigh against certification—the Idaho Supreme Court can decline certification if its caseload is too burdensome.

The spirit of comity and federalism. Plaintiffs contend that comity and federalism are not favored by certifying a question of state court first impression. *Id.* at 15. Plaintiffs are wrong. Constructions that reduce or eliminate clash between federal and state law promote comity and cooperative federalism. *Mengelkoch v. Indus. Welfare Comm'n*, 284 F. Supp. 956, 958 (C.D. Cal.

[3] Plaintiffs cite no authority for their argument that the Attorney General must show the Idaho Supreme Court "*is seeking* questions of certification." Dkt. 140 at 15 (emphasis added). That is not, in fact, how any Ninth Circuit case articulates the standard.

[4] The transcript for Chief Justice Bevan's remarks is available here and provides relevant context: https://isc.idaho.gov/news-article/2026-state-of-the-judiciary-address (last visited May 19, 2026).

1968) (citing *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (describing basis of *Pullman* abstention)). "When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of" the "core question" of whether the conflict "is really necessary." *Arizonans*, 520 U.S. at 46, 75. Certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost*, and increasing the assurance of gaining an authoritative response*." *Id.* at 76 (emphasis added). The point is avoiding a clash between sovereigns through invalidation of state law—a clash which is exactly the outcome that Plaintiffs seek. *Id.* at 79 (citing *Rescue Army v. Mun. Ct. of City of L.A.*, 331 U.S. 549, 566 (1947)).

The Ninth Circuit applied (some) federal canons of construction, rather than Idaho canons, in defining the breadth of "recruiting" under Idaho law. In contrast to the Idaho Supreme Court, the Ninth Circuit did not construe the statute as a unified whole, only considering the scope of the word "recruiting" in isolation, rather than in context with a specific intent mens rea, and beyond the limits on attempt liability under Idaho law. *Compare Matsumoto*, 122 F.4th at 808–11, with *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 68, 28 P.3d 1006,1011 (2001) (holding courts should "whenever possible, construe a statute so as to achieve a constitutional result" and "a law should not be held to be void for repugnancy to the Constitution in a doubtful case") (citations omitted); *Sweitzer v. Dean*, 118 Idaho 568, 571–72, 798 P.2d 27, 30–31 (1990) (holding courts may "examine the language used, reasonableness of the proposed interpretations, and the policy behind the statutes" in construction); *Petersen v. Franklin County*, 130 Idaho 176, 181, 938 P.2d 1214, 1219 (1997) (holding "[a] statute should be construed so that effect is given to its provisions, and no part is rendered superfluous or insignificant"); and cases at Dkt. 137-1 at 21–24. The Ninth Circuit did not, and could not, adopt a limiting construction to save the statute, which is the

"province" of the Idaho Supreme Court alone. *Doe*, 148 Idaho at 933, 231 P.3d at 1030; *accord Montes v. Spare Group, LLC*, 136 F.4th 1168, 1171 (9th Cir. 2025) (noting courts certify questions that a state supreme court "is better qualified to answer . . . in the first instance").

Rather than allow the federal constitution to clash with a state statute, this Court should work cooperatively with the Idaho Supreme Court to resolve the apparent conflict. Ultimately, the Ninth Circuit did not purport to predict how the Idaho Supreme Court would rule on the scope of the statute, and so that question of law remains undecided and subject to certification. Plaintiffs disagree and offer reasons why they think the Idaho Supreme Court would not narrow the statute. This amplifies the need for certification, rather than eliminating it. *Greater L.A. Agency on Deafness, Inc. v. Cable News Network*, 742 F.3d 871 (9th Cir. 2014) (mem.) (certifying question where parties disagreed on how state courts would rule on statutory interpretation question). The certification motion meets the requirements under controlling Ninth Circuit law. It should therefore be granted to avoid a clash between the federal constitution and state law.

II. The Certification Motion satisfies I.A.R. 12.3.

The certification motion is proper under the Idaho Appellate Rule inviting certification. I.A.R. 12.3. The question of law—the scope of the recruiting prong—is controlling as to the constitutionality of that prong under Plaintiffs' facial challenge. Again, the Idaho Supreme Court has never interpreted the statute. And a determination of this question will settle the meaning of the statute in a way that preserves it. As with other questions this Court has certified at summary judgment, resolving this question of law will advance resolution of the dispute by providing controlling law where none exists now. *Duffin*, 2017 WL 6543873 at *7; *see also Adamson v. Blanchard*, 133 Idaho 602, 604, 990 P.2d 1213, 1215 (1999) (noting procedural history).

In arguing against the certification motion's compliance with I.A.R. 12.3, Plaintiffs argue that a certified question would not end the dispute because the new construction of the statute

would then need to be re-reviewed for constitutionality. Not so, per *Bellotti* and *McKesson*, a state court is assumed to know and abide by federal constitutional limits in answering certified questions. Moreover, as in *McKesson*, certification need not be likely to end the litigation to be merited, 592 U.S. at 6 (contemplating parties raising and resolving other issues of state law after certification), nor does it need to be guaranteed to *eliminate* the conflict—if certification might *reduce* an apparent conflict, that is worthwhile as well. *Bellotti*, 428 U.S. at 147 (citation omitted).

III. Plaintiffs general objections are meritless.

Untethered from either the Ninth Circuit's test or I.A.R. 12.3, Plaintiffs offer a couple of miscellaneous arguments that miss the mark. Plaintiffs claim that delay in the case militates against certification, Dkt. 140 at 8, but this has proven no bar to the Court certifying questions at summary judgment in the past, *see Duffin*, 2017 WL 6543873. Here, while Plaintiffs complain of an ongoing chilling effect, Dkt. 140 at 8, this Court has preliminarily enjoined any enforcement of the very prong that would be certified for interpretation—precluding any potential chilling effect. Dkt. 58.

Plaintiffs also suggest, Dkt. 140 at 8–9, citing district court decisions and a Ninth Circuit opinion that did not apply the modern four-part test, that delay would cut against the time-saving nature of certification. But it is not unreasonable to make requests for certification alongside summary judgment—questions of statutory interpretation can await resolution as a matter of law at that stage. *Nw. Ass'n of Indep. Schs. v. Labrador*, 776 F. Supp. 3d 837, 861 (D. Idaho 2025) (citing cases) (rev'd and remanded on other grounds by 166 F.4th 1148).

Second, Plaintiffs argue that summary judgment is not the appropriate time to request certification because the Attorney General had prior opportunities to seek certification,[5] Dkt. 140

[5] Plaintiffs suggest the Attorney General should have requested certification in his briefing opposing a modified *preliminary* injunction, Dkt. 56. There is no rule that a party must take the first or earliest opportunity to certify, let alone in response to a mandate that has been issued directing preliminary relief.

at 9–11; *but see Nw. Ass'n of Independent Schs.*, *supra*. But Plaintiffs' cases on this point are distinguishable for the important reason that they concern requests for certification after final judgment and on appeal. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1108–09 (9th Cir. 2013); *Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984); *Elward v. Sealy Inc.*, No. 23-4143, No. 23-4421, 2025 WL 1189502 at *1 (9th Cir. Apr. 24, 2025) (mem.). Not one controlling case suggests that the start of summary judgment briefing is too late to move for certification. Plaintiffs do not cite a single case where certification was denied because the motion followed a preliminary injunction. Plaintiffs' citations to non-binding district court decisions either involve denials of certification requests made *after* summary judgment or denials because the proposed certified question was not, despite the movant's claim, unsettled. *E.g.*, *Schuler v. Battelle Energy All., LLC*, No. 4:18-CV-00234-CWD, 2019 WL 5295461 at *1 (D. Idaho Oct. 18, 2019).

Beyond distinguishable cases, Plaintiffs' argument fails for two more reasons. First, the question to be certified is not one that was argued on appeal: what the proper *state law* construction of Idaho Code § 18-623 ought to be under *state* canons rather than under federal ones. Plaintiffs simply misrepresent the TRO and appellate briefing on this point—no one cited state canons of construction or tried to predict the Idaho Supreme Court's construction. Dkt. 140 at 13. Thus, there is no binding answer to that discrete question. Second and more importantly, Plaintiffs err by citing cases involving disputes among private parties. Indeed, Plaintiffs do not cite *a single case* involving a request by a state attorney general seeking certification, nor any case involving certification to avoid unconstitutionality. A request by a state attorney general stands on special footing as, unlike private parties, the attorney general is a member of the state's executive branch who has the special obligation to interpret and defend state laws—his requests should be given "more respectful consideration" when he believes state courts would assign a constitutional

construction to state law. *Arizonans*, 520 U.S. at 77 & 78 n.30.[6]

Last, Plaintiffs complain that the Attorney General seeks certification on only one of three terms used in the statute. Dkt. 140 at 10. But the point of certification is to reduce conflict between federal and state sovereigns—what would be the point of certifying questions about a provision that the Ninth Circuit has already held to be constitutional? Certification, by design, is a one-way ratchet in favor of constitutionality. This is no "gamesmanship"—this is a procedural offramp that exists to vindicate federalism concerns extending beyond the narrow dispute between the parties.

* * *

No court in this case has tried to predict how the Idaho Supreme Court would rule on the certified question or tried to apply Idaho's methods of statutory interpretation—when federal courts do so, they do expressly. *Northwest*, 166 F.4th at 1157. Plaintiffs do not try to address Supreme Court precedent indicating that when a state attorney general seeks certification to avoid facial constitutionality, that request should be granted, even when a district and circuit court disagree with him as to the meaning of the statute. *Arizonans*, 520 U.S. at 54–56, 62–63, 75–80.

CONCLUSION

If the Court declines summary judgment in favor of the Attorney General, the Court should grant the motion for certification to the Idaho Supreme Court.

[6] As far as the cases suggesting such a different interpretation cited by the Attorney General, Dkt. 137-1 at 26–28, Plaintiffs don't explain how *State v. Manzanares* "confirms" the Ninth Circuit's approach and do not address the principles cited by the motion that are applied in *Doe*. Indeed, the distinction pointed to in the Response—that the mens rea in *Manzanares* was "grammatically embedded" in the definition of recruitment Dkt. 140 at 17-18, is not a distinction at all—the crime of abortion trafficking is *also* not complete without specific intent. Idaho Code § 18-623; *see also Manzanares*, 152 Idaho at 425, 272 P.3d at 397 (noting defendant's overbreadth argument "ignores what the Recruiting Provision does require the State to prove"). Moreover, whether the result in *Manzanares* would obtain here is ultimately a question for the Idaho Supreme Court, not an Article III court.

DATED: May 21, 2026

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on May 21, 2026, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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