Appeal No. 23-3787

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOURDES MATSUMOTO, et al.,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Idaho
The Honorable Debora K. Grasham
Case No. 1:23-cv-00323-DKG

RESPONSE TO RULE 27-3 EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

For the last five months, Defendant has told the district court in Idaho, repeatedly, and this Court, repeatedly, that he is not the proper defendant for Plaintiffs' claims, that he does not intend to enforce Idaho Code § 18-623, and thus, that Plaintiffs' lawsuit cannot go forward against him. Now, two days after Plaintiffs filed their answering brief explaining in detail why the Idaho Attorney General is the proper defendant, Defendant has done a 180. He now asks for an emergency stay of the district court's injunction so that he can enforce Idaho Code § 18-623. And notably, his emergency motion for a stay does not argue that he has Eleventh Amendment sovereign immunity.

Defendant insists that Idaho Code § 18-623 is a necessary tool to prevent adults from taking pregnant minors forcefully and against their will to states where abortion is lawful so that an abortion will be performed. It is not. He argues—as he did to the district court that rejected his arguments—that only criminal conduct is at issue, not First Amendment protected speech. He is wrong. As the district court properly held when it enjoined him from enforcing the statute, Plaintiffs have standing, Plaintiffs are likely to prevail on the merits of their First and Fourteenth Amendment claims, Plaintiffs will suffer irreparable harm if an unconstitutional statute is enforced, and the Idaho Attorney General is a proper defendant.

Other than his insistence that he must now prosecute, Defendant presents no

arguments in support of his emergency motion for a stay that are different from those he presented to and that were rejected by the district court in its November 8, 2023, memorandum decision and order. 01-ER-020-077. Instead, he continues to hope to prevail in this Court by citing the complaints and newspaper articles about a case charged in Bannock County, Idaho, and insisting the published facts about that case demonstrate that Idaho Code § 18-623 is necessary to reach that conduct. Rule 27-3 Emergency Motion for Stay Pending Appeal ("Motion for Stay") at 4–5. Not even those outside-the-record sources support his motion, however. No emergency exists. As those sources make clear, the defendants in the Bannock County case face serious charges that carry significant penalties. Thus, other Idaho criminal statutes, the constitutionality of which are not challenged and not at issue here, are sufficient to address the conduct that has Defendant so concerned. Moreover, this Court should not allow Defendant to obtain emergency stay relief through an argument that is at odds with the argument regarding Eleventh Amendment sovereign immunity that he made both in the district court and in his opening merits brief here.

Defendant continues to misunderstand who Plaintiffs are and what Plaintiffs do, and that Plaintiffs hope to continue those activities but fear prosecution under an unclear statute. Plaintiffs are an individual and two organizations that assist pregnant people, including pregnant minors, obtain abortions. They do so in Idaho and, for the two organizations, also in other primarily western states. They advise pregnant

minors, help them identify legal options for abortion care, and provide financial and travel assistance. Many of the pregnant people, including pregnant minors, who they help are survivors of domestic abuse or sexual assault who do not have significant support structures. The circumstances surrounding Plaintiffs' past and desired future actions do not involve deception, holding a person against their will, or forcing them to make a decision they do not want to make. To the contrary, Plaintiffs seek to help minors by sharing information and providing practical support for individuals who are, but do not wish to be, pregnant and who actively seek out Plaintiffs' assistance.

This Court should deny Defendant's emergency motion for a stay.

ARGUMENT

I. Legal Standard.

Defendant bears a heavy burden on his motion for a stay pending appeal. A "stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, issuance of a stay is an exercise of judicial discretion. *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020).

An applicant for a stay must demonstrate (1) a strong likelihood of success on the merits; (2) irreparable harm absent a stay; (3) a stay will not substantially injure other parties; and (4) the public interest favors a stay. *Nken*, 556 U.S. at 434. The first two factors are the most critical. *Id.* And if a motion for stay pending appeal

fails to make a "threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Doe #1 v. Trump*, 957 F.3d at 1058 (alteration in original) (citation omitted).

II. Defendant Cannot Show Irreparable Harm; No Emergency Exists.

Defendant's emergency motion does not make a threshold showing of irreparable harm absent a stay. He buries his legal argument that irreparable harm will occur absent a stay at page 15 of his brief and devotes only eight lines to it. Motion for Stay at 15. He argues that irreparable harm arises out of the district court's injunction because it precludes Idaho from enforcing its duly enacted laws, and because there is an ongoing and concrete harm to Idaho's law enforcement and public safety interests. *Id.*

This argument falls far short of the threshold showing of irreparable harm Defendant must make. As the district court noted in its order enjoining Defendant from enforcing Idaho Code § 18-623, the State of Idaho does not suffer irreparable harm by "being enjoined from enforcing a statute that has been shown likely to violate the Constitution." 1-ER-075.

Nor is there any concern that as a result of the injunction in this case Idaho lacks the ability to prosecute the conduct alleged in the complaints filed in two criminal cases currently pending in Bannock County, Idaho. Defendant spends considerable time in his emergency motion here, just as he did in his opening merits

brief, arguing that Idaho Code § 18-623 is necessary to address such conduct. Motion for Stay at 4–5. Citing the complaints, probable cause affidavits, and newspaper articles in the Bannock County case, he argues that the mother and son charged there violated Idaho Code § 18-623 by "traffick[ing] the victim," "recruit[ing] the victim into aborting her child," and "dissuad[ing] her from telling her mother about the pregnancy at all." *Id.* at 4.

Aside from the fact that dissuading a pregnant minor from telling her parent or guardian about the pregnancy itself is not implicated by any reading of Idaho Code § 18-623, Defendant's own argument demonstrates that there is no emergency and there is no irreparable harm arising out of the injunction. To the contrary, the Bannock County prosecutor has addressed the alleged conduct through serious charges that carry significant penalties upon any conviction: the son is charged with statutory rape, which carries a penalty of one year to life imprisonment (Idaho Code § 18-6104); second-degree kidnapping, which carries a penalty of one year to 25 years imprisonment (Idaho Code § 18-4504(2)); and three counts of production of sexually exploitative materials with a child, which carries a penalty of up to 30 years imprisonment (Idaho Code § 18-1507(4)); and the mother is charged with, among other offenses, second-degree kidnapping. By contrast, violation of Idaho Code § 18-623 carries a penalty of only no less than two and no more than five years imprisonment. Idaho Code § 18-623(5).

In addition, those outside-the-record Bannock County cases have not been resolved, and even by Defendant's description, do not involve facts similar to Plaintiffs' prior and intended future conduct.

Plaintiffs, by contrast, have established that they will suffer irreparable harm absent injunctive relief. "Irreparable harm is relatively easy to establish in a First Amendment case." *CTIA –Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 851 (9th Cir. 2019). Where a plaintiff establishes "a colorable First Amendment claim, they have demonstrated that they likely will suffer irreparable harm." *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (citing *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014)).

Here, each Plaintiff wishes to be able to speak and act freely on a matter of paramount importance to them and on which they have publicly held themselves out for years preceding enactment of Idaho Code § 18-623. They wish to continue to hold themselves out in alignment with their missions, they wish to continue soliciting public support for these missions, they wish to continue to provide information, money, and practical support in accordance with their missions, and they wish to continue to associate freely with others who share their viewpoint. And they wish to do this for all persons, including minors who may be survivors of violence, who may not have trusted adults in their lives, and who may be in danger. *See* 4-ER-408, ¶ 43; 4-ER-425, ¶ 11; 4-ER-417, ¶ 34. As the district court

recognized, Plaintiffs' intended communicative activities are protected by the U.S. Constitution. 1-ER-038–39 ("[T]he assistance and supportive activities Plaintiffs provide to pregnant minors clearly encompass expressive activity in furtherance of Plaintiffs' beliefs, missions, and purposes."). The injunction is allowing Plaintiffs to engage in this assistance without fear of Defendant prosecuting, and the irreparable harm is clear in the self-censoring that followed the adoption of this law.

Because Defendant has not made a threshold showing of irreparable injury, and because Plaintiffs have demonstrated irreparable injury absent an injunction, this Court should deny Defendant's emergency motion for a stay pending appeal.

III. The Other Stay Factors Weigh Against Defendant's Motion.

The other stay factors also weigh against Defendant's motion. The district court properly determined that Plaintiffs are likely to prevail on their First Amendment and Fourteenth Amendment claims, and the public interest and balance of equities tip in Plaintiffs' favor.

A. Plaintiffs, Not Defendant, Have Made the Requisite Showing Regarding Likelihood of Success on the Merits.

Defendant in his emergency motion for a stay does not make the required strong showing of a likelihood of success on the merits. That "strong showing" requirement, *Nken*, 556 U.S. at 434, is greater than the likelihood of success on the merits showing required to obtain injunctive relief from the district court, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

1. Idaho Code § 18-623 targets speech, expressive conduct, and association based on content, and thus is subject to strict scrutiny.

Idaho Code § 18-623 is aimed at speech, expressive conduct, and association. It "seeks to regulate spoken words [and] significantly restricts opportunities for expression," and therefore can be subject to a facial challenge. *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180, 1188 (9th Cir. 2022) (citation omitted). Idaho Code § 18-623 has "a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Id.* (citation omitted).

Idaho Code § 18-623 directly targets Plaintiffs' speech, based on the content of what they are saying, when it forbids "recruiting" a minor. While the term is undefined by the statute, it is clear from Defendant himself that Plaintiffs' actions could be in violation of the "recruiting" prohibition of Idaho Code § 18-623 purely through speech. At the hearing before the district court, in answer to the court's question, "[H]ow do you recruit someone without speech?" Defendant responded, "Well, again, it could be through speech." 2-ER-114. Although, at the same hearing, Defendant also said that "simply talking" would not be "obtaining" or "procuring" an abortion. 2-ER-108; *see also* 2-ER-122.

Regardless of Defendant's shifting assertions, and as the district court noted, Plaintiffs' constitutional rights do not depend on Defendant's changing ideas about

what First Amendment protections Plaintiffs may have. 1-ER-031, n.11; *Doe v. Harris*, 772 F.3d at 580–81 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." (citation omitted)); *Spirit of Aloha*, 49 F.4th at 1192 ("We are not bound by officials' promises that they will enforce the guidelines responsibly."). Prohibitions on speech because that speech supports the decision to have an abortion is an unconstitutional abridgement of Plaintiffs' First Amendment rights. *See Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, 220 S.W.3d 732, 741 (Mo. 2007) (providing information about abortion is core protected speech).

Likewise, Idaho Code § 18-623's prohibitions on communicating with and assisting minors by "harboring" or "transporting" also improperly offend Plaintiffs' First Amendment rights to expressive conduct. These undefined terms seek to prevent Plaintiffs from engaging in expressive conduct solely because of the message these actions communicate: that pregnant minors who choose to avail themselves of abortion health care where it is legal are not alone, and that their choices are deserving of practical and financial support from those, like Plaintiffs, who stand in public solidarity with them. Plaintiffs have long histories of advocating for reproductive justice and that message has been understood by the community, including by pregnant minors who have sought information, financial support, and practical assistance from Plaintiffs based on their expressions of support. This is

intentional: Plaintiffs' speech and actions are not only undertaken to assist the pregnant people themselves, but also to convey publicly understood messages of reproductive justice solidarity with minors, and with the community at large. *See* 4-ER-425, ¶ 11; 4-ER-420, ¶ 56.

Idaho Code § 18-623 also targets Plaintiffs' protected First Amendment associational activity. *See Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). The Supreme Court has recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (citation omitted). Plaintiffs' expressive activity, which is understood by others to be in furtherance of their beliefs about reproductive integrity, is the basis upon which they attract volunteers and donors and communicate with like-minded others. Without the ability to engage in First Amendment protected activities, Plaintiffs would be unable to communicate their messages in support of reproductive self-determination. This would prevent them from associating with other individuals and groups that share their beliefs, however unpopular those beliefs may be. *See* 4-ER-420, ¶ 57. Idaho Code § 18-623 would also prevent both NWAAF and IIA from attracting the donors and volunteers who have supported them based on their message and who fear being prosecuted for their support. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) ("Our prior cases teach that the

solicitation of charitable contributions is protected speech[.]").

In short, Plaintiffs amply demonstrated that Idaho Code § 18-623 infringes on their fundamental First Amendment rights, and Defendant here does not make a strong showing to the contrary.

2. Defendant presented no evidence to suggest Idaho Code § 18-623 would survive strict scrutiny.

Idaho Code § 18-623 is a content- and viewpoint-based restriction on speech and expression because it targets speech and expression only about abortion, and it targets viewpoints that favor abortion access. Thus, this Court must subject the statute to strict scrutiny. *See Roberts*, 468 U.S. at 623. Strict scrutiny requires that a law be narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The state bears the burden of proving that the law meets this standard. *Pierce v. Jacobsen*, 44 F.4th 853, 862 (9th Cir. 2022).

Defendant makes no attempt in his emergency motion for a stay to show or argue how Idaho Code § 18-623 survives strict scrutiny. Instead, he insists that Idaho Code § 18-623 reaches only criminal conduct, and not speech. Motion for Stay at 7–10. That argument fails.

Speech about unlawful activity is generally protected by the First Amendment unless: (1) it is commercial speech; (2) it is likely to incite imminent, unlawful action; or (3) it is integral to criminal conduct. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973); *Brandenburg v. Ohio*, 395 U.S.

444, 447 (1969) (per curiam); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). But procuring an abortion in a state where abortion is legal is not an unlawful activity, and Idaho's legislature cannot make it so. Therefore, the speech restrictions placed by Idaho Code § 18-623 are an effort to stop people from procuring lawful out-of-state abortion care by criminalizing the sharing of information or resources about this lawful conduct.

Defendant does not make a strong showing that he will prevail on the merits of Plaintiffs' First Amendment claims. This Court should deny his emergency motion for a stay pending appeal.

3. Idaho Code § 18-623 is unconstitutionally vague.

Criminal laws are subject to exacting scrutiny under the Fourteenth Amendment because "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. De George*, 341 U.S. 223, 230 (1951). Vagueness concerns are heightened where a statute "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

As the district court concluded in finding that Plaintiffs demonstrated a likelihood of success on the merits of their Fourteenth Amendment claim, Idaho Code § 18-623 "fails to provide fair notice or ascertainable standard of what is and what is not abortion trafficking." 1-ER-069. It determined that the terms "'recruiting,

harboring or transporting' are undefined, overbroad, and vague, making it impossible for a reasonable person to distinguish between permissible and impermissible activities." *Id.* The district court pointed to Defendant's own arguments at the preliminary injunction hearing and to one of the statute's co-sponsors' statements to support the conclusion that the statute is vague. 1-ER-071.

Defendant argues in his emergency motion for a stay that Plaintiffs' Fourteenth Amendment claim is inconsistent with their First Amendment claim. He argues that Plaintiffs cannot both argue that Idaho Code § 18-623 is muzzling them and preventing them from engaging in First Amendment protected activity *and* that the law is so vague they lack fair notice of what it proscribes. Motion for Stay at 10–11. He argues that Plaintiffs, by arguing for purposes of standing that they intend to engage in conduct proscribed by the law, concede that Idaho Code § 18-623 is not vague as applied to their intended conduct. *Id.*

Plaintiffs make no such concession. Plaintiffs describe, in detail, the activities that they previously have engaged in, their desire to continue to engage in them, and their concern that if they do so, they may be prosecuted. For the reasons set forth above, these activities are protected by the First Amendment. Plaintiffs further allege that they are unsure what among those First Amendment protected activities the statute proscribes, so they intend to refrain from their usual activities for fear of prosecution. *See* 4-ER-404, ¶ 11; 4-ER-408–09, ¶ 47; 4-ER-409, ¶ 48; 4-ER-451, ¶

41; 4-ER-451–52, ¶ 43; 4-ER-425–26, ¶¶ 16–20. The statute is vague.

Defendant does not make a strong showing that he will prevail on the merits of Plaintiffs' Fourteenth Amendment claim. This Court should deny his emergency motion for a stay pending appeal.

4. The balance of equities and public interest weigh against a stay pending appeal.

The balance of equities and public interest weigh in Plaintiffs' favor. Plaintiffs have made a showing that they, not Defendant, are likely to prevail on the merits of their First and Fourteenth Amendment claims. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citations omitted). Moreover, because Plaintiffs raise serious First Amendment questions, the balance of hardships tips sharply in their favor. *Am. Beverage Ass'n*, 916 F.3d at 758 (citing *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007)).

IV. Plaintiffs Have Standing.

Defendant does not meet his burden of showing a strong likelihood of success on the merits of his argument that Plaintiffs lack standing. As the district court correctly held, 1-ER-032-061, Plaintiffs demonstrated: (1) that they have an injury in fact that is concrete and particularized, and actual or imminent; (2) that their injury is fairly traceable to the challenged conduct of the Defendant; and (3) that their injury would likely be redressed by a favorable decision. *Susan B. Anthony List v.*

Driehaus, 573 U.S. 149, 157-58 (2014). They submitted detailed and unrefuted declarations establishing that: (1) they help survivors of gender-based violence and those who are, but do not wish to be, pregnant, 4-ER-404, ¶ 16; 4-ER-405, ¶¶ 22–24, 28–29; 4-ER-408–09, ¶ 46; 4-ER-414–15, ¶¶ 16–22; 4-ER-417, ¶ 37; 4-ER-418, ¶ 42; 4-ER-424, ¶ 4; 4-ER-425, ¶ 11; 4-ER-438–40, ¶¶ 1–6; 4-ER-451–52, ¶¶ 43–44; 4-ER-453, ¶¶ 53–54; (2) some of the people they help are minors, and the help they provide includes sharing information, funding, and other practical support as needed and requested by the pregnant person, 4-ER-408–09, ¶ 47; 4-ER-417–18, ¶¶ 40–43; 4-ER-424, ¶¶ 5–6; 4-ER-451, ¶ 41; and (3) they do so without requiring parental consent, and in some cases fearing that the parental relationship is unsafe or unsupportive, and that their assistance may allow a young person to conceal an abortion, 4-ER-439–40, ¶¶ 2–6; 4-ER-451, ¶ 41; 4-ER-452–54, ¶¶ 44–57. NWAAF and IIA also established that they accept charitable donations given based on their work and use their funds in furtherance of their missions, on activities the statute seeks to proscribe. 4-ER-439, ¶ 3; 4-ER-461, ¶¶ 84, 86; 4-ER-418–19, ¶¶ 45–49; 4-ER-426–27, ¶¶ 24–27.

Plaintiffs satisfied the injury-in-fact requirement by demonstrating "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298

(1979). They also met their Article III traceability and redressability requirements because the injunction alleviates Plaintiffs' genuine concerns of being criminally prosecuted by Defendant for exercising their constitutionally protected rights.

Defendant makes two redressability arguments here, as he did in his opening merits brief. He argues that because Plaintiffs' conduct violates other Idaho statutes and because county prosecuting attorneys not enjoined could still prosecute Plaintiffs under those statutes or Idaho Code § 18-623, Plaintiffs' injury is not redressed by enjoining him. Motion for Stay at 14–15. This argument ignores the standard for redressability and Plaintiffs' relatively modest burden under it. "A plaintiff meets the redressability requirement if it is likely, although not certain, that his injury can be redressed by a favorable decision." *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010). Moreover, they "need not show that a favorable decision will . . . [redress] *every* injury." *Massachusetts v. E.P.A.*, 549 U.S. 497, 525 (2007) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Rather, as the district court correctly observed, Plaintiffs are "not required to solve all roadblocks simultaneously and [are] entitled to tackle one roadblock at a time." 1-ER-057 (quoting *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012)). Here, they challenge only Idaho Code § 18-623, and Defendant's authority to prosecute them under it. They have standing to do so.

V. Defendant Has Abandoned His Eleventh Amendment Argument

Notably absent from Defendant's emergency motion for a stay pending appeal is any claim that he is not the proper defendant because he has Eleventh Amendment sovereign immunity and thus that the *Ex parte Young*, 209 U.S. 123 (1908), exception does not apply. That is a position he has taken and an argument he made at every earlier juncture of this litigation. *See, e.g.*, 2-ER-124; 2-ER-125; 2-ER-126; 2-ER-127; 2-ER-128; 2-ER-132; 3-ER-145–48; 3-ER-149; 3-ER-150; 3-ER-151; 3-ER-164; 3-ER-206; 3-ER-211–12; 3-ER-213–14; 3-ER-215; 3-ER-216–17; 3-ER-218–20; 3-ER-255; 3-ER-278; 3-ER-279; 3-ER-280; Appellant's Opening Brief at 13, 22–28, 30. Defendant argued in the district court hearing that "the Attorney General has specifically disavowed his authority to prosecute without a referral from a prosecuting attorney." 2-ER-124-25. He also argued that "the Attorney General wrote, quote, the Attorney General has no authority to threaten criminal prosecutions on the abortion trafficking ban. Now, if that wasn't clear enough, on page 38, the Attorney General wrote that, quote, he lacks any prosecutorial authority under the abortion trafficking ban at this time." 2-ER-125.

In his motion to dismiss in the district court he argued that "he has not threatened and cannot threaten any prosecution under the Abortion Trafficking Ban," 3-ER-211-12, and "[i]ndeed, the Attorney General cannot enforce the challenged law absent circumstances not pled here, and so is not a proper defendant."

3-ER-213-14. And in his opening brief filed in this Court, he wrote that he has immunity under the Eleventh Amendment because "[h]e lacks the necessary connection to enforcement of Idaho Code § 18-623," Appellant's Br. at 13, and "he has no enforcement authority concerning this statute under any circumstances that Plaintiffs have alleged," *id.* at 22.

Apparently, in his zeal to assert there is an emergency need to prosecute cases like the Bannock County case, he has now abandoned his Eleventh Amendment argument. This Court should hold him to his new position throughout this appeal and deny his emergency motion for a stay pending appeal. No emergency exists. As set forth above, the Bannock County case is being prosecuted under statutes that carry much longer potential penalties than does Idaho Code § 18-623. There is no need to stay the district court's preliminary injunction, let alone to do so on an emergency basis.

CONCLUSION

This Court should deny Defendant's emergency motion for a stay pending appeal.

DATED: January 25, 2024.

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CERTIFICATE OF COMPLIANCE

9th Circuit Case No.: 23-3787

I am one of the attorneys representing Appellees.

This response complies with Cir. R. 27-1(1)(d) because it does not exceed 20 pages, excluding parts exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f). This response complies with Cir. R. 27-1(1)(c) and Fed. R. App. P. 27(d)(1) because it has been prepared in Word using proportionally spaced typeface, 14-point Times New Roman.

Dated: January 25, 2024

/s/ Wendy J. Olson
Wendy J. Olson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 25, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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