Nos. 23-726 & 23-727

In the Supreme Court of the United States

MIKE MOYLE, SPEAKER OF THE IDAHO HOUSE OF REPRESENTATIVES, ET AL., *Petitioners*,
v.
UNITED STATES, *Respondent*.

IDAHO, *Petitioner*,
v.
UNITED STATES, *Respondent*.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEGISLATIVE PETITIONERS' UNOPPOSED MOTION FOR DIVIDED ARGUMENT

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Pursuant to Rules 21 and 28.4 of this Court, the Legislative Petitioners move for divided argument in these consolidated appeals, set for one hour of oral argument on April 24, 2024. Legislative Petitioners move to allocate 15 minutes of time for counsel of record for the State and 15 minutes of argument time for counsel of record for the Legislature. Granting this motion would not require the Court to enlarge the overall time for argument. Counsel for the State has stated it consents to this motion for divided argument. Counsel for the United States has stated it has no objection to this motion.

1. In 2020, Idaho enacted abortion regulations (now titled the Defense of Life Act) to take effect if *Roe v. Wade*, 410 U.S. 113 (1973), were overruled or a constitutional amendment "restor[ed] to the states their authority to prohibit abortion." 2020 Idaho Sess. Laws 827; *see* Idaho Code §18-622 (2023). Weeks after this Court overruled *Roe* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and shortly before Idaho law was set to take effect, the U.S. Government sued Idaho in federal court to enjoin enforcement of Idaho's abortion law in Idaho hospitals. Invoking the Supremacy Clause, the Government claimed that a condition of Medicare funding preempts Idaho's law. The district court agreed, holding that the Emergency Medical Treatment and Labor Act, 42 U.S.C. §1395dd, preempts Idaho law because EMTALA requires abortions in circumstances that the district court concluded Idaho law would prohibit abortions. The Legislature successfully sought a stay of the preliminary injunction. *See United States v. Idaho*, 83 F.4th 1130 (9th Cir. 2023). After the *en banc* Ninth Circuit vacated the stay without explanation, 82 F.4th

1296, the Legislature and the State separately filed stay applications in this Court. This Court granted both stay applications, construed them as petitions for writ of certiorari before judgment, granted the petitions, and consolidated the cases for one hour of argument on April 24, 2024.

2. The Government's preemption arguments require this Court to confront significant questions about the balance of state and federal lawmaking power regarding abortion. For the country's first 200 years, "each State was permitted to address" the "profound moral issue" of abortion "in accordance with the views of its citizens." *Dobbs*, 142 S. Ct. at 2240. But the Government argues here that Congress gave it the last word on abortion policy in hospital emergency rooms when it enacted EMTALA, even though EMTALA says nothing about abortion and expressly protects a pregnant mother's "unborn child," 42 U.S.C. §1395dd(e)(1)(A)(i).

3. Petitioners have participated in this litigation through separate counsel to defend state law. The Legislature intervened to oppose the preliminary injunction and submitted testimony from physicians and other witnesses. *See* Idaho Code §67-465(1).[1] After the district court granted the preliminary injunction and denied the State's and the Legislature's reconsideration motions, the State and the Legislature

[1] The district court denied intervention as of right but "grant[ed] permissive intervention on a limited basis to allow the Legislature to present argument and evidence (including witnesses) in opposition to the United States' pending Motion for Preliminary Injunction." D.Ct. Doc. 27, at 1 (Aug. 13, 2022). After the court granted the preliminary injunction, the Legislature moved for reconsideration of the preliminary injunction and renewed its motion to intervene as of right. The court denied intervention as of right and stated, "As the Court did allow the Legislature to permissively intervene to oppose the United States' motion for preliminary injunction, the Court will fully consider the Legislature's motion for reconsideration." D.Ct. Doc. 125, at 10 (Feb. 3, 2023). The court then denied the State's and Legislature's reconsideration motions and concluded that "the State and the Legislature may appeal." D.Ct. Doc. 135, at 11 (May 4, 2023).

filed separate appeals, separate appellate briefs, separate stay applications in this Court, and separate merits briefs.

4. To be sure, the State and the Legislative Petitioners are aligned in their defense of Idaho's Defense of Life Act, and they have vigorously opposed the Government's preemption theory. The Legislative Petitioners have participated separately to vindicate distinct interests as the State's legislative branch. *Cf. Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022) (acknowledging "different branches of government may see the State's interests at stake in litigation differently," such that "a State is free to empower multiple officials to defend its sovereign interests in federal court").

5. Preemption cases such as this one impact the Legislature in a unique way given its responsibility to craft legislation that will not conflict with federal law. The decision below undermines the Legislature's power to make the distinctly legislative judgments required for abortion legislation, exceptions to such legislation, and healthcare legislation more broadly. Accordingly, in this litigation, the Legislature relied on its own witnesses and emphasized textual and constitutional arguments specific to its lawmaking role in our federalist system. The Legislature's opening merits brief relies on that factual record and compares Idaho's legislation with congressional abortion legislation to show there is no direct conflict between EMTALA and Idaho law. The Legislature's brief also explores constitutional questions that the Gov-

ernment's novel preemption theory would raise—for example, whether conditions attached to spending clause legislation could operate as a line-item veto for the State's laws.

6. The Court has often granted divided argument to enable the legislative branch to present its distinct institutional interests. *See Gill v. Whitford*, 582 U.S. 965 (2017) (mem.) (granting motion by the Wisconsin Legislature, as an *amicus*); *California v. Texas*, 141 S. Ct. 209 (2020) (mem.) (granting motion by U.S. House of Representatives); *Dep't of Com. v. New York*, 139 S. Ct. 1543 (2019) (mem.) (granting motion by U.S. House of Representatives, as an *amicus*); *United States v. Texas*, 578 U.S. 917 (2016) (mem.) (granting motion by U.S. House of Representatives, as an *amicus*); *NLRB v. Noel Canning*, 571 U.S. 1092 (2013) (mem.) (granting motion of Senator McConnell and 44 other members of U.S. Senate, as *amici*); *Citizens United v. FEC*, 557 U.S. 952 (2010) (mem.) (granting motions by U.S. Senators); *Morrison v. Olson*, 485 U.S. 985 (1988) (mem.) (granting motion by U.S. Senate). As in those cases, divided argument here will materially assist the Court by allowing the legislative branch to offer its distinct perspective.

7. Finally, the extraordinary public importance of these issues warrants divided argument. The case involves the division of power between the states and the federal government to legislate regarding abortion, an issue on which "Americans continue to hold passionate and widely divergent views." *Dobbs*, 142 S. Ct. at 2242. This Court has granted divided argument in cases of similar public importance. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 1263 (2021) (mem.); *Rucho v.*

Common Cause, 139 S. Ct. 1316 (2019) (mem.); *Abbott v. Perez*, 584 U.S. 928 (2018) (mem.); *NFIB v. Sebelius*, 565 U.S. 1193 (2012) (mem.); *Friedrichs v. Cal. Teachers Ass'n*, 577 U.S. 1004 (2015) (mem.). And the Court has routinely granted motions for divided argument to allow the U.S. Solicitor General to participate in cases involving the constitutionality of state abortion laws. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 44 (2021) (mem.); *Gee v. June Med. Servs. L.L.C.*, 140 S. Ct. 931 (2020) (mem.); *Whole Woman's Health v. Hellerstedt*, 577 U.S. 1128 (2016) (mem.); *Hill v. Colorado*, 528 U.S. 1059 (1999) (mem.); *Planned Parenthood of Se. Pa. v. Casey*, 503 U.S. 957 (1992) (mem.); *Webster v. Reprod. Health Servs.*, 489 U.S. 1076 (1989) (mem.).

8. For the foregoing reasons, the Legislative Petitioners respectfully request that the Court grant this motion for divided argument and allow counsel of record for the State 15 minutes of argument time and counsel of record for the Legislature 15 minutes of argument time. Counsel for the State consents to this motion. Counsel for the United States has no objection.

Respectfully submitted,

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