APP NO. 23A763

In the Supreme Court of the United States

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

Applicant,

v.

PAM POE, by and through her parents and next friends Penny and Peter Poe, et al.,

Respondents.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING APPEAL

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INTRODUCTION

Idaho should be able to protect children from experimental medical procedures that cause irreversible and life-long harms. Although the two minor Plaintiffs seek only a single procedure regulated by Idaho's VCPA—the taking of estrogen[1]—they defend a state-wide injunction covering 2 million people and 18 other procedures for any child of any age. Under this injunction, Idaho cannot even stop surgeons from performing the proscribed operations on five-year-old children, even though Plaintiffs' own experts don't defend such a practice.

The injunction here has the characteristic marks of a "universal" injunction: it "direct[s] how the defendant must act toward persons who are not parties to the case," *Dep't of Homeland Sec.* v. *New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay). It "purport[s] to define the rights and duties of [ ] millions of people who are not parties" before the Court. *United States* v. *Texas*, 599 U.S. 670, 694 (2023) (Gorsuch, J., concurring in judgment, joined by Thomas & Barrett, JJ.). And it involves a "rushed, high-stakes, low-information decision[ ]," enjoining a state law that regulates many different procedures, on the request of two Plaintiffs with limited interaction with the law. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay).

[1] While Plaintiffs say that one of them also takes puberty blockers (Resp.27 n.14), the record does not clearly show this, App.D.139, and the injunction is overbroad either way. This Court may simply stay the injunction as to non-parties and instruct the lower court to narrow relief to the actual procedures Plaintiffs seek.

In short, Idaho will likely prevail in reversing the injunction's scope. Plaintiffs disagree, arguing the broad injunction is permitted because it preserves their anonymity and is thus "incidental" to giving them relief. But Plaintiffs are not the first anonymous parties to appear in federal court, and when ordinary measures like a sealed order would have accomplished the same end, it is hard to see their argument about anonymity as anything but a route to class relief without a class action.

And in any case, if an injunction for 2 million can be "incidental" to relief for 2, then to permit "incidental" relief is simply to permit universal injunctions under another name.

Plaintiffs cannot show—and the district court did not rule—that the Act is facially unconstitutional, since it has many obviously constitutional applications. Neither can Plaintiffs claim standing to request an injunction against the portions of the law restricting treatments they do not intend to seek. They will suffer no injury from a narrower injunction, much less an irreparable injury, while Idaho and its citizens face irreparable harm because the injunction halts their efforts to protect children from experimental drugs and medical procedures that even Plaintiffs' experts acknowledge are not appropriate for some categories of children.

This Court should intervene to stop the judicial excess of yet another universal injunction that goes far beyond its proper scope.

ARGUMENT

I. Idaho Will Likely Prevail on Appeal.

Plaintiffs do not dispute that this Court is likely, at some point, to address the question presented: "whether a district court, after holding that a law violates the Constitution, may nonetheless enjoin the government from enforcing that law against non-parties to the litigation." *Griffin* v. *HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 (2023) (Statement of Kavanaugh, J., joined by Barrett, J.). Instead, they argue the district court's order does not present that question, but rather only "a highly fact-bound question" within the district court's discretion to tailor relief to the parties. Resp.4.

But calling this injunction "incidental" to party-specific relief amounts to defending universal injunctions. Here, the district court enjoined every application of every provision of Idaho's law to every one of its nearly 2 million residents on the theory that a narrower scope might somehow hinder Plaintiffs' access to the drugs they seek. If this sweeping injunction is merely "incidental," it's hard to imagine a case in which a universal injunction would not pass muster, even if a law is facially constitutional and even if the plaintiffs lack standing to challenge the entire law. So this case raises the precise "questions about the scope of courts' equitable powers under Article III" that members of this Court have raised. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay). And if the district court's expansive injunction "were affirmed on appeal" by the Ninth Circuit, there is "a reasonable probability that this Court would eventually grant certiorari on the question presented." *Griffin*, 144 S. Ct. at 1 (Statement of Kavanaugh, J.).

A. Universal Injunctions Are Not "Incidental" Relief to Parties.

Plaintiffs' "fact-bound" defense does not allow them to dodge the circuit split on universal injunctions. After all, the same flawed reasoning motivated the courts of appeals that have upheld universal injunctions since *Trump* v. *Int'l Refugee Assistance Project* ("*IRAP*"), 582 U.S. 571 (2017) (per curiam). The Eighth Circuit has approved of universal injunctions on that ground, see *Rodgers* v. *Bryant*, 942 F.3d 451, 460 (8th Cir. 2019), and it affirmed one against a law like the VCPA because the state purportedly "failed to offer a more narrowly tailored injunction that would remedy Plaintiffs' injuries." *Brandt by & through Brandt* v. *Rutledge*, 47 F.4th 661, 672 (8th Cir. 2022). Likewise, the Seventh Circuit affirmed a universal injunction under *IRAP* because it was "necessary to render complete relief to the plaintiff, even if that relief extends *incidentally* to non-parties." *City of Chicago* v. *Barr*, 961 F.3d 882, 920–21 (7th Cir. 2020) (emphasis added). And the Fourth Circuit reached the same conclusion about *IRAP* but then affirmed a universal injunction as properly "tailored … to the issues presented in the case." *Roe* v. *Dep't of Def.*, 947 F.3d 207, 232 (4th Cir. 2020), *as amended* (Jan. 14, 2020). The circuit split on this question implicates both *whether* and *when* a district court may issue injunctive relief in favor of nonparties, and what relief counts as "incidental." Appl.31–32.

This case presents an excellent vehicle to address those questions. The injunction here far exceeds any possible legitimate connection to the controversy between the parties. Plaintiffs do not dispute that the district court enjoined the VCPA as to parties they do not represent and as to procedures that they do not seek,

their experts do not endorse, and the district court did not address. An injunction on those terms extends relief to non-parties and breaches both the settled standards for facial challenges and the fundamental Article III requirement that Plaintiffs have standing. Allowing Plaintiffs to defend this broad injunction as an exercise of the district court's "'discretion and judgment'" would amount to abrogating these limits on courts' injunctive power. Resp.24–25 (quoting *IRAP*, 582 U.S. at 579).

Plaintiffs say the district court got it right because they are proceeding under pseudonyms, and unless a court enjoins every provision of the VCPA statewide, they would have to "disclose their identities as the transgender plaintiffs in this litigation to staff at doctors' offices and pharmacies" to obtain their prescriptions for hormone therapies. Resp.4. But Plaintiffs' doctors already know they identify as transgender—that's why the doctors are prescribing estrogen to male patients. And HIPAA and medical ethics require the doctors to keep Plaintiffs' medical information secure and confidential. 45 C.F.R. §§ 164.102–534 (HIPAA Privacy and Security Rules). There's no *per se* harm from presenting the doctors or pharmacists with a sealed court order granting Plaintiffs access to estrogen, and any purported harm from the doctors or pharmacists connecting Plaintiffs to this litigation is the definition of speculative.

Nor is there any reason to think the doctors or pharmacists would ignore a sealed order. Plaintiffs have presented no declarations from doctors or any other evidence suggesting they need something more to keep treating Plaintiffs. The record is devoid of evidence showing that plaintiff-specific relief would be ineffective. And rank "speculation about third-party behavior will not do." *L.W. ex rel. Williams* v.

Skrmetti, 83 F.4th 460, 490 (6th Cir. 2023). Indeed, a district court in the Eleventh Circuit provided the very remedy that Plaintiffs' say is impossible here: it issued individual injunctions to pseudonymously identified plaintiffs to access puberty blockers and cross-sex hormones. *Doe* v. *Lapado*, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *17 (N.D. Fla. June 6, 2023) (ordering that the defendants "must not take any steps to prevent the administration of GnRH agonists or cross-sex hormones to Susan Doe, Gavin Goe, or Lisa Loe" or to enforce the law "against Susan Doe, Gavin Goe, or Lisa Loe, or their parents or healthcare providers").

Plaintiffs do not cite a single case that justifies breaching the constitutional limits on equitable power, facial challenges, and subject-matter jurisdiction to protect a party's anonymity. Plaintiffs also misunderstand litigation anonymity for minors, which courts allow to prevent retaliation. See*, e.g.*, *Doe* v. *Stegall*, 653 F.2d 180, 186 (5th Cir. Unit A 1981). That protection does not exist to prevent everyone in the world from knowing the minor's identity or connection to the litigation. For example, a child subject to a custody decree in a divorce may have her identity protected in court filings, but school officials and medical professionals who need to know the decree's terms will still receive access to it. The same is true here. Proceeding pseudonymously protects the minor from adverse publicity, which a sealed court order in Plaintiffs' private medical records would easily accomplish.

When the injunction Plaintiffs seek goes so far beyond what is necessary to protect them individually, it is difficult to escape the conclusion that their actual goal is to obtain relief for others as well as themselves. There is nothing inherently wrong

with that—in fact, an entire rule of civil procedure is devoted to it—but Plaintiffs did not follow the rule: they did not file a putative class action, and they did not find class representatives with standing to challenge each provision of the law that they oppose. Cf. Fed. R. Civ. P. 23(a), (b)(2). The task was not impossible; plaintiffs in Indiana challenging a similar law seem to have managed it. *K.C.* v. *Individual Members of the Med. Licensing Bd. of Ind.*, No. 1:23-cv-00595-JPH-KMB, 2024 WL 247284, at *2 (S.D. Ind. Jan. 23, 2024), *stay granted by* 2024 WL 811523 (7th Cir. Feb. 27, 2024).

Or Plaintiffs could have filed challenges alongside doctors who perform the various procedures, as similar actions in other jurisdictions have done. *E.g.*, *id.* at *3; Compl. ¶¶ 15, 17, *Voe* v. *Mansfield*, No. 1:23-cv-00864 (M.D.N.C. Oct. 11, 2023) (suing on behalf of individual providers and an association of providers). Having failed to pursue either line of relief for nonparties, Plaintiffs cannot use their individual claims and individual injuries as the vehicle to enjoin the entire law against the world. If there is any limit to what a district court can accomplish with its "discretion and judgment," this case exceeds it. *IRAP*, 582 U.S. at 579.

The universal injunction is especially inappropriate here given the VCPA's severability clause. Idaho Code § 18-1506C(6). Because the clause "leaves no doubt" that the legislature intended the Act to be severable, courts "should adhere" to its text. *Barr* v. *Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality op.). Even without a severability clause, courts follow "a strong presumption of severability." *Id.* at 2350. Yet here the district court did not even analyze whether it

could sever the law and hold some provisions constitutional. This case presents an ideal opportunity for this Court to address the excesses of universal injunctions.

B. Plaintiffs' Facial Challenge Cannot Succeed.

As a back-up, Plaintiffs try to justify the district court's universal injunction by saying the Act is facially unconstitutional. Resp.26. But not even the district court went that far. It insisted a universal injunction was appropriate for an as-applied challenge and never found the Act "unconstitutional in all of its applications," as a facial challenge requires. App.A.52–53; *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008). The district court's reluctance is understandable; the Act has many applications that are plainly constitutional.

Take the Act's ban on removing healthy genitals in minors through surgeries like "castration" and "vaginoplasty." Idaho Code § 18-1506C(3)(a). As Plaintiffs' expert admits, the Endocrine Society does *not* recommend these surgeries for minors. App.D.130. Neither England, nor Finland, nor Denmark allows them. App.D.67, 77; Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People: Interim Report* 33 (Feb. 2022), https://bit.ly/4bzkiJI ("Cass Review"). They are sterilizing and irreversible without proven benefits. Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology & Metabolism 3869, 3893 (2017); App.D.86–87. Not even Plaintiffs try to defend these surgeries, instead downplaying them as "rare." Resp.9 & n.4.

Restricting these surgeries easily satisfies rational-basis or intermediate scrutiny. It safeguards "the physical and psychological well-being" of minors. *New York* v. *Ferber*, 458 U.S. 747, 756–57 (1982). And it substantially furthers that objective by banning procedures that the legislature and medical opinions recommend against. *City of Los Angeles* v. *Almeda Books, Inc.*, 535 U.S. 425, 438 (2002) (deferring to city's interpretation of scientific evidence). So there is a clear means-end fit between banning genital surgeries and preventing harm to vulnerable children. *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 70 (2001); accord *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977) ("[B]road legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples.").

In response, Plaintiffs say this (constitutional) application doesn't count because the Act is "irrelevant" when surgery is "not medically indicated." Resp.26. But individual doctors do not always follow best practices and do what is "medically indicated." In fact, Plaintiffs' own expert allows some of these surgeries. App.D.27–28. As do many other doctors. See Br. of Ala. and 18 Other States as Amici Curiae ("States' Br.") 19–22 (detailing evidence of surgical procedures on children); Azeen Ghorayshi, *More Trans Teens Are Choosing 'Top Surgery'*, N.Y. Times (Sept. 26, 2022), https://bit.ly/3T0YzSA. Idaho does not need to wait for these harmful procedures to become frequent before it can protect children from them.[2]

[2] Idaho need not show that anyone has performed genital surgeries on minors in Idaho. States can rely on "the experience of . . . other cities and states" from around

Nor can Plaintiffs avoid this conclusion by insisting these surgeries are rare. Perhaps Dr. Connelly's clinic allows genital surgeries on only 1 minor patient in 1,000. Resp.9–10 n.4. That only proves that 1 minor patient in 1,000 needs Idaho's protection. And even if there were somehow an exceptional case where a minor wanted such a surgery and a court allowed it, the "mere possibility" that the law may have unconstitutional applications "in a rare case is plainly insufficient to invalidate the statute on its face." *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (plurality op.). That's particularly true under intermediate scrutiny (even more so rational basis) where the challenged law does not have to "be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Nor need it be "drawn as precisely as it might have been." *Michael M.* v. *Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 473 (1981) (plurality op.). A court cannot facially invalidate an entire law "based upon a worst-case analysis that may never occur." *Ohio*, 497 U.S. at 514.

Plaintiffs try to avoid this conclusion by arguing that laws that fail intermediate scrutiny are in fact unconstitutional in all applications. Resp.26. But that confuses the substantive rule with the scope of relief. The "facial" label "does not speak at all to the substantive rule of law." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1127 (2019). Under Plaintiffs' theory, universal injunctions would be standard practice because failure to satisfy intermediate scrutiny would always doom the whole law.

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the country in developing their own laws. *Mitchell* v. *Comm'n on Adult Ent. Establishments*, 10 F.3d 123, 133 (3d Cir. 1993). And no one disputes that American clinicians are performing these life-changing surgeries on minors. Resp.9–10 & n.4.

But this Court recently warned against jurisprudence that "dilute[s] the strict standard for facial constitutional challenges." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 286 (2022). That's exactly what the injunction here does. It ignores "some quite straightforward applications" of the law that are plainly constitutional and invalidates the whole thing anyway. *Webster* v. *Reprod. Health Servs.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in judgment).

C. Plaintiffs Cannot Challenge Most of the Act.

The ban on genital surgeries is one example of why Plaintiffs cannot seek injunctive relief against most of the Act. Plaintiffs do not seek surgery of any kind. App.D.139, 144. Yet they sought and obtained an injunction covering surgical procedures affecting no one before the Court. App.A.54.

This is improper, for "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 431 (2021). And a court has authority to remedy only the government action that is causing a plaintiff's injury-in-fact. *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."). Since neither the statute's regulation on testosterone prescribed to females nor the bans on various surgeries injured Plaintiffs, those portions of the Act "were not the proper object" of the district court's injunction. *Lewis*, 518 U.S. at 358.

Plaintiffs lament the burden of finding "individuals seeking each specific procedure," Resp.27, and assert the ability to lump all the procedures together

because the Act bans them all. *Id.* at 27–28. But they cite no case establishing an "inconvenience exception" to Article III. And they ignore that Idaho's law is severable. Idaho Code § 18-1506C(6). Their argument would mean that any statute that makes many different things illegal can be facially enjoined by a plaintiff who only does one of them. But this Court said the opposite in *Lewis*, narrowing an injunction because it addressed prison policies that didn't affect the injured plaintiff. 518 U.S. at 357. Without standing to challenge the Act's regulations of testosterone or surgery, Plaintiffs cannot challenge them, and the injunction should not have addressed them.

II. The Equities Warrant a Stay.

The district court's sweeping injunction "inflicts irreparable harm" on Idaho's sovereignty and subjects its citizens to dangerous medical interventions. *Abbott* v. *Perez*, 585 U.S. 579, 602–03 n.17 (2018) (citing *Maryland* v. *King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). Narrowing it will not harm Plaintiffs in the least, as the district court can fashion an injunction that allows them to access their desired drugs. *E.g.*, *Lapado*, 2023 WL 3833848, at *17. Plaintiffs' contrary arguments conflict with the science and standard of review.

Whatever one makes of the competing scientific evidence, some things are clear. *First*, everyone—even courts rejecting laws like Idaho's—recognizes that medicalized transition carries "[k]nown risks," including "loss of fertility and sexual function." *E.g.*, *Eknes-Tucker* v. *Marshall*, 603 F. Supp. 3d 1131, 1139 (M.D. Ala. 2022), vacated sub nom. *Eknes-Tucker* v. *Governor of Ala.*, 80 F.4th 1205 (11th Cir. 2023). *Second*, respected voices, cited by Plaintiffs' expert, caution that long-term

risks of medicalized transition, like neurological development and bone density, are poorly understood. App.D.33, 110–12. Per Plaintiffs' expert, there's not "enough data to draw conclusions about adverse effects on brain development" in children given puberty blockers. App.D.33. *Third*, evidence establishing a causal relationship between medicalized transition and positive outcomes is lacking. App.E.2–6. *Fourth*, the landscape is changing rapidly, as European authorities increasingly turn against medicalized transition and research continues apace. App.D.76–80. It is notable that Sweden, a country that pioneered medicalized transition, now acknowledges the risks of these interventions "currently outweigh the benefits." *Id.* And *fifth*, surgical interventions, particularly genital surgeries, are in their own category because not even the Endocrine Society recommends their use in minors, and multiple countries ban them. App.D.66–67, 77, 124, 128; Cass Review, at 63.

These scientific truths constitute "legislative facts"—facts relevant "to legal reasoning and the lawmaking process"—not "adjudicative facts" about the specific parties or facts of the case. Fed. R. Evid. 201, Advisory Comm. Notes. Appellate courts owe no deference to a district court's view of legislative facts. *Lockhart* v. *McCree*, 476 U.S. 162, 168 n.3 (1986). And little deference applies anyway "to a written record like this one and the dueling affidavits that accompany it." *L.W.*, 83 F.4th at 488. Instead, courts owe deference to state legislatures in areas of "medical and scientific uncertainty." *Gonzales* v. *Carhart*, 550 U.S. 124, 163 (2007). This Court has cautioned that federal courts should not "embroil themselves in ongoing scientific controversies beyond their expertise." *Glossip* v. *Gross*, 576 U.S. 863, 882 (2015) (cleaned up).

So balancing the equities isn't close here: Idaho seeks to protect its most vulnerable citizens by narrowing an injunction that would still afford Plaintiffs complete relief. Even since Idaho filed this petition, one more circuit has implicitly recognized states' interest in enforcing laws like the VCPA, staying an injunction that a district court entered against Indiana. *K.C.* v. *Individual Members of the Med. Licensing Bd. of Ind.*, No. 23-2366, 2024 WL 811523 (7th Cir. Feb. 27, 2024).

Plaintiffs, on the other hand, ask to keep a broad injunction they don't need based on speculative harms to people not before the Court. This Court should stay the injunction as it goes beyond giving Plaintiffs access to their desired interventions.

III. This Court Is Likely to Grant Review on the Question Presented.

This case presents all the harms associated with universal injunctions, and nothing complicates review. Everyone agrees the injunction precludes Idaho from enforcing its law against nonparties, so it clearly implicates the concerns expressed by members of this Court in *Texas*, *Griffin*, and *New York*. *Texas*, 599 U.S. at 694 (Gorsuch, J., concurring in judgment); *Griffin*, 144 S. Ct. at 2 (Statement of Kavanaugh, J.); *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay). The case doesn't involve any First Amendment or Administrative Procedure Act issues. *Griffin*, 144 S. Ct. at 2 (Statement of Kavanaugh, J.). And the fact that it involves a single state's law simply makes it more attractive because it avoids the procedural complication of pre-existing dueling injunctions from dueling circuits and allows the Court to focus on the simple question of whether district courts can "direct

how the defendant must act toward persons who are not parties to the case." *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay).

Plaintiffs say these concerns fall away when an injunction prevents a single sovereign state from enforcing its laws. The opposite is true. The "serious questions about the scope of courts' equitable powers under Article III" remain, as do practical concerns, like forum shopping. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay). As the state amici explained, counsel challenging Alabama's similar law appear to have engaged in forum-shopping even though it was a law in a single state subject to a single federal court of appeal. States' Br. 22–25. The availability of universal injunctions necessarily invites chicanery like multiple filings in state and federal courts, calculated voluntary dismissals when an unfavorable judge is drawn, re-filings to obtain different judges, and the same kind of "rush[ing] from one preliminary injunction hearing to another" that should concern any court. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay). Alabama's experience proves it. States' Br. 22–25.

This case—procedurally simple but substantively egregious—presents an ideal vehicle for addressing universal injunctions. The Court should "confront" this "increasingly widespread practice" and enter the requested stay. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay).

CONCLUSION

The Court should issue a stay of the district court's injunction pending appeal insofar as it grants relief to non-parties.

Dated: March 1, 2024

Respectfully submitted,

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