No. 23-3787
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,
Plaintiffs-Appellees,

v.

RAÚL LABRADOR, in his capacity as the Attorney General for the State of Idaho,
Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Idaho
No. 23-CV-00323-DKG
The Honorable Debora K. Grasham

BRIEF OF AMICI CURIAE THE IDAHO ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PLAINTIFFS-APPELLEES

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The Idaho Association of Criminal Defense Attorneys ("IdACDL") is a non-profit, voluntary organization of defense lawyers; it is the only organization in Idaho whose membership is limited to those who work exclusively on the side of criminal defendants in the justice system. The statement of purpose for this organization is as follows:

> The objective and purpose of the Idaho Association of Criminal Defense Lawyers is to promote study and research in the field of criminal law and related subjects; to disseminate by lecture, seminars, and publications the knowledge of the law relating to criminal defense practice and procedure; to promote the proper administration of justice, to foster, maintain, and encourage the integrity and independence of the judicial system and the expertise of the defense lawyer in criminal cases; to hold periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby to protect individual rights and improve the criminal law, its practices and procedures.

The IdACDL was first incorporated in 1989. The organization includes both public defenders and private counsel. Its attorney and investigator members work in Idaho state court as well as federal court; our membership includes defense practitioners who work on the trial level, on appeals, as post-conviction attorneys, and in federal habeas proceedings. Accordingly, the members of IdACDL have knowledge and

experience regarding Idaho's criminal law at virtually every procedural stage of a criminal case. Because of this, the IdACDL has a strong interest in ensuring that Idaho's criminal laws are only enforced within the bounds of federal and state constitutional limits.

Although a substantial number of IdACDL's members practice in the federal courts of Idaho, the majority of our membership are active criminal defense practitioners in Idaho's state court system. As such, the IdACDL—by and through its members—has a unique knowledge and perspective regarding Idaho criminal laws, their interpretation, and their practical application. The IdACDL therefore can provide practical insight as to the likely impact and application of I.C. § 18-623 on the Plaintiffs in this case, the people of Idaho, and even those in our sister states whose actions may be impacted or even criminalized by the nearly unbounded scope of this statute's terms.

Pursuant to FRAP 29(a)(4)(E), Amici affirm that no publicly held corporation owns stock in them. No counsel for either party authored this brief in whole or in part. And no party, party's counsel, person, or other entity contributed money to preparing this brief.

All parties have consented to this brief's filing.

ARGUMENT

I. The abortion travel ban statute, contained at I.C. § 18-623, is an unprecedented expansion of criminal liability to those who aid the *lawful* acts of another

The IdACDL is deeply concerned about the potential enforcement of I.C. § 18-623, both within and outside of our state borders. Idaho Code § 18-623 is a radical departure from traditional criminal statutes in Idaho and elsewhere—both as it relates to principles of accomplice liability and as it relates to traditional limits on inchoate criminal offenses. This statute is also unlike conventional human trafficking statutes. When traditional human trafficking laws are compared with the conduct addressed in I.C. § 18-623, these stark differences are readily apparent. This is because the travel ban statute criminalizes assistance to a minor who is voluntarily seeking to engage in conduct that may be entirely lawful.

Other human trafficking statutes that have come up in the briefing in this case require that the transportation of a person be for the purpose of activity that is either illegal in all states (such as sexual contact with a minor child) or that is compelled (such as involuntary servitude or

compelled sexual activity).[1] The same is true of Idaho's own human trafficking statute under I.C. § 18-8602. This alone makes traditional human trafficking statutes different in kind than the travel ban contained at I.C. § 18-623.

Unlike those laws, there is nothing in I.C. § 18-623 that requires that the pregnant minor be seeking an abortion that is unlawful to perform in the place where the procedure occurs. There is nothing in this law that requires that the pregnant minor be transported to another state against his or her will. This statute contains no element that the person charged must have *induced* the minor to seek an abortion or an abortifacient, or that the minor underwent the procedure or consumed medication as a result of force, fraud, or coercion. Merely adopting the label of "trafficking," and applying similar terminology for efforts to assist in dissimilar conduct, does not render the travel ban adopted at I.C. § 18-623 a meaningful analog to traditional human trafficking statutes.

[1] *See* Appellant's Brief, pp.5-6; *see also* Nev. Rev. Stat. § 201.300; Ohio Rev. Code Ann. § 2905.32; Wa. Rev. Code § 9A.40.100; 18 U.S.C. § 1590.

This statute also appears to be an anomaly when compared to Idaho's pre-existing regime of criminal statutes. Much of the conduct unrelated to a minor seeking to terminate a pregnancy had already been addressed elsewhere in the Idaho Code. The perceived need to codify the prohibitions in I.C. § 18-623 indicates that this statute has a unique, and uniquely harmful, purpose. It seems **designed** to chill lawful, constitutionally protected activity relating to access to abortion.

Idaho's criminal statutory scheme already contains numerous other provisions that address the more injurious acts that might be conceptually related to the travel ban statute. For example, our kidnapping statutes apply to those who entice away or detain a child under the age of 16 with the intent to hide the child from a parent, legal custodial, or legal guardian.[2] I.C. §§ 18-4501 - 4504. It is a misdemeanor

[2] To the extent that the Defendant appears to rely heavily on two unrelated pending criminal cases in Idaho, where the defendants are solely charged with kidnapping, this Court may wish to note that the prosecutor handling those cases has publicly disavowed any connection between the abortion travel ban statute and the pending charges. *See* Appellant's Brief, pp.6-7; Shelbie Harris, *Prosecutor: Kidnapping case has nothing to do with Idaho's 'abortion trafficking' law*, Idaho State Journal (Nov. 2, 2023), https://www.idahostatejournal.com/news/local/prosecutors-kidnapping-case-has-nothing-to-do-with-idahos-abortion-trafficking-law/article_46994720-79b3-11ee-8e2a-034d5edcf0db.html. According to

to entice a minor under 16 years of age to leave their home or enter a vehicle without the authority of a parent or one with legal custody of the child. *See* I.C. § 18-1509. There is already a law in Idaho that makes it an offense to provide shelter to a minor under 17 without the authority of a parent or legal guardian. I.C. § 18-1510. To the extent that there are more general concerns about persons "harboring" or "transporting" minors in Idaho without parental consent, the Idaho Code had laws addressing these acts well before I.C. § 18-623 was adopted.

It is presumed in Idaho that the legislature, when it enacts a new law or amends an old one, intends for that change to have a different meaning or purpose than prior law. *See, e.g., Nye v. Katsilometes*, 447 P.3d 903, 910 (Idaho 2019). With that in mind, the only remaining conduct under I.C. § 18-623 not previously addressed in Idaho law are assisting a pregnant teenager to gain access to information relating to abortion services or medication, and assisting the minor in receiving this care.

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this article, the handling prosecutor has stated on the record that the "Idaho abortion trafficking statute is not implicated in this case." *Id.*

Outside of the context of abortion, Idaho appears to have no other restriction in the criminal code that is meaningfully similar. Idaho Code § 18-623 appears to be a prohibition without parallel for Idaho citizens (and potentially those outside our state borders).

II. The provisions of I.C. § 18-623, when read in conjunction with Idaho law regarding attempted offenses and accomplice liability, may have far more sweeping implications than is apparent when its terms are read in isolation

Standing alone, the terms of I.C. § 18-623 are unconstitutionally vague and overbroad. But when considerations of accomplice liability—*i.e.*, aiders and abettors, accessories after the fact, and/or conspirators—are considered, the potential sweep of this statute is almost boundless in its reach. For both the First Amendment and the vagueness issues that confront this Court, it is necessary to bear in mind that I.C. § 18-623 would not just apply in Idaho against those **directly** providing transportation, housing, funds, medication, or medical services to a minor. It would apply to anyone whose actions fell within the wide scope of accomplice liability under Idaho law.

Idaho has, by statute, abolished the distinction between principals (who directly commit a criminal offense) and aiders and abettors (who

merely assist in the commission of the crime with the specific intent that the crime occur). *See* I.C. §§ 18-204; 19-1430. The Idaho Supreme Court has discussed the scope of criminal liability as an aider and abettor as follows:

> The aiding and abetting statute therefore requires the actor to either: (1) directly commit the crime; (2) aid and abet in the crime's commission; or (3) if not present at the crime, advised or encouraged in its commission. Put succinctly, "aiding and abetting requires some proof that the accused participated in or assisted, encouraged, solicited, or counseled the crime." In terms of the mental state required for aiding and abetting, simply having knowledge of the crime is not enough. Rather, aiding and abetting "contemplates a sharing by the aider and abettor of the criminal intent of the perpetrator."

Rome v. State, 431 P.3d 242, 253 (Idaho 2018) (internal citations omitted) (emphasis added).

"'To be an aider and abettor one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking.'" *State v. Capone*, 426 P.3d 469, 474 (Idaho 2017) (quoting *State v. Scroggins*, 716 P.2d 1152, 1158 (Idaho 1985)). For I.C. § 18-623, liability as an aider and abettor only requires a person to act with: (1) awareness that a minor is seeking an abortion (or information relating to obtaining an abortion) without parental knowledge; and (2) an intent to assist, encourage, solicit, or counsel any other person toward that end.

So long as any action (including supplying information other than about a health care benefit) is undertaken with this intent, and is of any discernible assistance to a minor in Idaho seeking an abortion, the requisites of this statute are met.

The impact of criminal conspiracy law on the applicability of I.C. § 18-623 is also striking. In Idaho, a criminal conspiracy only requires an agreement between two or more individuals to accomplish an illegal objective, coupled with one or more overt acts in furtherance of that purpose. *See, e.g., State v. Medina*, 447 P.3d 949, 955 (Idaho 2019). The act taken in furtherance of the conspiracy need not be by the person charged—an action by "one of the coconspirators" suffices. *Id.* In addition, there is no particular degree of formality required to establish the "agreement" to accomplish the illegal purpose. The "agreement need not be formal or express but may be inferred from the circumstances." *State v. Gallatin*, 682 P.2d 105, 110 (Idaho Ct. App. 1984).

Moreover, it does not matter whether the underlying criminal objective is accomplished or not. A person may be charged and convicted of a conspiracy where the intended crime never occurs, so long as any of the conspirators took a substantial step towards its furtherance. At the

same time, a person may be convicted of *both* conspiracy and the underlying offense as separate crimes. *See, e.g., State v. Sanchez-Castro*, 339 P.3d 372 (Idaho 2014).

Finally, Idaho law also punishes any person who attempts to commit a crime, even if their efforts fall short of completing the offense. *See* I.C. § 18-306. Because Idaho's abortion travel ban statute carries a potential penalty of up to five (5) years, this means that any person guilty of an attempt to violate I.C. § 18-623 faces a mandatory sentence of up to two and one-half years. I.C. §§ 18-306(2), -623. However, given the nature of what is rendered criminal under I.C. § 18-623, the traditional limits on what types of actions may be punished as an attempt seem to be rendered nugatory.

Traditionally, a person cannot be convicted for the attempt of a criminal offense in Idaho where their alleged actions fell short of a substantial step towards the underlying criminal objective, but instead reflected merely planning or preparation. *See, e.g.*, *State v. Grazian*, 164 P.3d 790, 795-96 (Idaho 2007) (abrogated on other grounds by *Verska v. St. Alphonsus Regional Med. Ctr.*, 265 P.3d 502, 505-507 (Idaho 2011)). The line between an act in furtherance of the offense and actions which

are merely in preparation can be hard to draw in a **traditional** criminal case. At the very least, the actions of the person charged with an attempt must "reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation of the crime." *See State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003).

But, for Idaho Code § 18-623, the preparation and planning **is** the offense—at least in a significant majority of its potential applications. This statute, when read in conjunction with Idaho's standards for criminal attempts, could be applied to any person who took a substantial step towards making a plan or preparations for a minor to obtain an abortion. There is no way to know how far back into inchoate action the line may be drawn under I.C. § 18-623. The only thing for certain is that this statute's application makes conduct that previously was not punishable, even as an attempt, a crime with a hefty prison sentence attached.

III. Idaho Code § 18-623 criminalizes speech and communications based on content and viewpoint; and cannot survive strict scrutiny review

> When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear,

> it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010).

While the First Amendment confers on the people the right to think for ourselves, and to share information with one another, I.C.§ 18-623 seeks to stifle this dialogue when it comes to those who seek to provide information on a particular subject and for a particular purpose. This statute, by its terms, makes the "providing of information" that may assist a minor seeking an abortion a potential crime. It also criminalizes the act of "recruiting" a minor to obtain an abortion-inducing drug or an abortion, without defining the meaning of that term.

The plain language of I.C. § 18-623 applies to otherwise constitutionally protected speech and communications. It criminalizes those communications based on both the content and viewpoint expressed. And I.C. § 18-623 unconstitutionally chills the exercise of First Amendment freedom of association as a result.

A. In light of the manner in which Idaho courts are required to interpret our state statutes, I.C. § 18-623 can only be reasonably interpreted as directly criminalizing certain types of speech and communication based on content and viewpoint

The Idaho Attorney General has argued on appeal that I.C. § 18-623 "does not 'target speech or expressive conduct,'" and that, as a result, there is no First Amendment issue with its enforcement. *See* Appellant's Brief, p.24. *Amicus* finds this argument concerning, and particularly at odds with Idaho's case law that defines how statutes must be interpreted by our state courts.

Under these standards, the only way that this statute could be interpreted not to target speech, expression, and associations would be by either reading out key portions of this statute (and thereby rendering these provisions a nullity) or by revising the statute's plain language. Neither option is available under Idaho law. Idaho courts are charged with interpreting our state statutes only **as written**; they cannot and will not do otherwise:

> … if a statute is not ambiguous, the Court does not construe the statute, but rather, simply follows the law as written. If a statute is unambiguous, the Court does not consult legislative history or other extrinsic evidence in an effort to alter the legislative intent expressed in the language itself. The Court will not revise or void an unambiguous statute on the grounds

> that it is patently absurd or that it would produce absurd results when applied as written. If a statute is unsound or the policy behind it unwise, the power to correct the statute rests with the Legislature, not the judiciary.

State v. Montgomery, 408 P.3d 38, 42 (Idaho 2017) (internal citations omitted).

Given this, in Idaho, the language of the statute defining an offense has primacy above all else when it comes to interpreting what acts are within (or outside) the definition of a particular crime. The gravamen of the offense under I.C. § 18-623 is set forth within the first section of this statute:

> 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**.

I.C. § 18-623(1) (emphasis added). The phrase indicated in bold is especially important for this Court. It is this language that demonstrates that I.C. § 18-623 as drafted was intended to apply to speech and communications based on their content.

This conclusion is compelled by the manner in which Idaho courts are required to interpret our state statutes. The Idaho Supreme Court mandates that a statute must be construed as a whole; each word or phrase must be read both in light of its context within that statute, and with regard to any other statutes that are *in pari materia*. Idaho courts cannot interpret a statute in a manner that would render any word or phrase a nullity. *See, e.g., St. Alphonsus Regional Med. Ct'r v. Elmore Cty.*, 350 P.3d 1025, 1029-30 (Idaho 2015); *Verska*, 265 P.3d at 505-507.

When interpreting the terms of a statute, the reviewing court generally must apply the "plain, usual, and ordinary meaning" of the statute's words. *See, e.g., Hooley v. State*, 537 P.3d 1267, 1274 (Idaho 2023). However, a different rule governs where the legislature steps in to provide a specific definition for, or limitation on, the terms within a statutory scheme or provision. "When the legislature defines a term within a statutory scheme, that definition controls the term's meaning within the context of the included statutes." *State v. Gutierrez*, 469 P.3d 643, 646 (Idaho Ct. App. 2020).

For First Amendment purposes, a key provision of I.C. § 18-623(1) is the following sentence: "As used in this subsection, the terms 'procure'

and 'obtain' shall not include the providing of information regarding a health benefit plan." Under Idaho law, courts interpret limiting language, such as the phrase "regarding a health benefit plan," as operating to exclude any other categories that may fall within the more generic activity encompassed within the phrase "the providing of information." The Idaho Supreme Court has repeatedly "recognized as a rule of statutory construction the Latin maxim, '*expressio unius est exclusio alterius*,' which literally means 'to express or include one thing implies the exclusion of the other.'" *Smith v. Excel Fabrication, LLC*, 535 P.3d 1098, 1104 (Idaho 2023). This is a "'universally recognized rule of statutory construction'" within Idaho case law; it does not permit a court to interpret a statute in a manner that allows for the inclusion of any other things where a statute is expressed in specific, definite, and exhaustive terms. *KGF Development, LLC v. City of Ketchum*, 236 P.3d 1284, 1288 (Idaho 2010) (quoting *Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 586 P.2d 1346, 1355 (Idaho 1978)).

In order to give effect to the last sentence of I.C. § 18-623(1), Idaho courts would be required to interpret this statute as criminalizing the act of providing information on **any** subject matter beyond potential

coverage for surgical or medical abortion under a health benefit plan,[3] so long as the State could make the case that a person who provided this information ultimately was of some assistance to a minor in either procuring an abortion or obtaining an abortifacient.

Reading speech and communications out of the statute renders the last sentence of I.C. § 18-623(1) both an idle pronouncement and a nullity. On the other hand, reading the statute as permitting a person or entity to provide **any other** information, beyond that relating to a health benefit plan, for this purpose would be an act of judicial amendment to the statute's plain terms. Both alternative readings are impermissible under Idaho law.

That leaves only one reasonable conclusion: I.C. § 18-623 expressly covers and criminalizes certain acts of providing information. Providing information is, quite literally, the definition of communication.[4] It is an

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[3] As an additional layer of complication, there are competing definitions of what constitutes a "health benefit plan" scattered throughout the Idaho Code; and nothing within I.C. § 18-623, the statutory definitions for this chapter (I.C. § 18-604), or Title 18 that would tell a person which definition—if any—would apply. *See, e.g.,* I.C. §§ 32-1214B(3); 41-4703(15); 41-5203(13); 41-5501(7); 41-5903(23).

[4] *See* "Communication," Merriam-Webster Online Dictionary; https://www.merriam-webster.com/dictionary/communication (last visited 1/15/24) ("a process by which information is exchanged between

inherently communicative act. Moreover, this statute makes speech and communication either criminal or sanctioned based upon its content – i.e., where that communication may be of use for a minor who is seeking to procure an abortion or obtain an abortifacient, with the sole exception being communications that are only "regarding a health benefit plan."

This renders I.C. § 18-623 a statute that criminalizes speech and communicative activity based on its contents. As is discussed further below, this places I.C. § 18-623 in the realm of statutes where First Amendment protections are at their highest.

B. Idaho Code § 18-623 imposes criminal punishment on a substantial amount of constitutionally protected speech and communicative conduct, and does not withstand strict scrutiny

The standard for unconstitutional overbreadth, both for freedoms of speech and association, is whether a substantial number of the law's applications are unconstitutional judged against the statute's plainly legitimate sweep. *See, e.g., Americans for Prosperity v. Bonta*, 594 U.S. ___, 141 S.Ct. 2373, 2387 (2021); *United States v. Stevens*, 559 U.S. 460, 473 (2010). As in *Americans for Prosperity*, the "lack of tailoring" in the

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individuals through a common system of symbols, signs, or behavior; *also*: exchange of information, a verbal or written message").

conduct identified in I.C. § 18-623 "is categorical—present in every case." 141 S.Ct. at 2387. Accordingly, this statute fails the "exacting scrutiny" that must be applied to its provisions.

Idaho Code § 18-623 is expressly directed, at least in part, at speech and communications. But its impact on speech and communications does not merely extend to activity relating to providing information. It would also apply to any attempts at "recruiting" a minor for purposes of any abortion services or medications intended to induce an abortion. It appears largely undisputed by the parties that the term "recruiting," as used within this statute, would almost certainly involve communications and communicative activity in its applications.

Even providing financial support to pregnant teenagers who are seeking safe, legal abortions in another state has First Amendment implications. Solicitation of charitable donations or contributions is protected speech. *Riley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 789 (1988). And monetary contributions, when used as a tool to advocate for a political position, may be properly deemed a form of speech. Those organizations, corporations, or persons who wish to protest what they view as draconian restrictions or ill-advised policy

of government are free to use their financial resources as the vehicle for that protest. *Citizens United*, 558 U.S. at 349-355. "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Id*. at 349.

And merely because a statute criminalizes speech does not mean that this speech is *ipso facto* "speech integral to criminal conduct"—a category of communications lacking in First Amendment protection. Under the definition of this exception provided by the United States Supreme Court, there are important caveats. That is, that the speech or writing must be used as an integral part of **other** conduct that is in violation of a **constitutionally valid** criminal statute. *See, e.g., Giboney v. Empire Storage and Ice*, 336 U.S. 490 (1949). The most common example of speech that is integral to criminal conduct is the offense of solicitation. *See, e.g., United States v. Hansen*, 599 U.S. 762, 770-78 (2023). But this exception requires "intentional encouragement of **an unlawful act**" where the government seeks to exact criminal punishment for speech or communications. *Id*. at 771 (emphasis added). "Speech intended to bring about a particular unlawful act has no social

value; therefore, it is unprotected." *Id.* This is the defining feature of speech that is "integral to unlawful conduct." But I.C. § 18-623 is not limited to these confines when it comes to speech and communication.

In the case of I.C. § 18-623, the underlying act of a minor obtaining an abortion or medications to induce an abortion may be entirely legal (either within Idaho or outside our territorial boundaries), but any act of "encouragement" towards that end would be punishable with a mandatory prison sentence nonetheless. Notably, the *Hansen* Court characterized any criminal statute that criminalizes facilitation or solicitation of a **legal** act of another as a "sharp break" from the long understood and nearly universal understanding of what constitutes criminal solicitation. *Id.* at 777-78.

Once one dispenses with the notion that any speech rendered criminal by statute is automatically "speech integral to criminal conduct," the sweeping overbreadth of I.C. § 18-623 becomes clear. Even if abortion is illegal in one state, providing information about abortion services that are legally available in another state is protected speech under the First Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 818-29 (1975). Under the guidance of the *Bigelow* Opinion, it is apparent that

most of the potential conduct within I.C. § 18-623 would likely be protected speech and communication:

> The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' **Portions of its message, most prominently the lines, 'Abortions are now legal in New York. There are no residency requirements,' involve the exercise of the freedom of communicating information and disseminating opinion**.
>
> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests. Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.

Bigelow, 421 U.S. at 822 (internal citations omitted) (emphasis added).

Because the services at issue were legally provided in the state where the abortion provider was located (New York), the *Bigelow* Court held that Virginia could not regulate the provider's conduct in that state, proscribe the provider's advertising activity about these services, and "[n]either could Virginia prevent its residents from travelling to New

York to obtain those services … or prosecute them for going there." *Id.* at 823-34.

Under the *Dobbs* decision, the United States Supreme Court placed primacy on the rights of **each** state to make rational choices regarding the right to terminate a pregnancy for medical or other reasons. *Dobbs v. Jackson Women's Health Org.*, 512 U.S. 215, 232 (2023). This right necessarily has equal force for those states that have retained the concept of a constitutional right to privacy under their own state constitutions, or otherwise protect abortion rights by statute. Idaho Code § 18-623 transgresses the respect for the legislative choice of another state that *Dobbs* mandates must be observed. The manner in which Idaho seeks to enforce its own legislative choice upon other states through this statute is contrary to both the First Amendment and the core values articulated by *Dobbs*.

The chilling effect of this statute on speech and communications directly spills over into protected associational activity as well:

> The First Amendment prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with

> others." Protected association furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." Government infringement of this freedom "can take a number of forms."

Americans for Prosperity, 141 S.Ct. at 2382 (internal citations omitted).

For both First Amendment protected speech and association, I.C. § 18-623's reach is broad. The statute is not meaningfully or narrowly tailored to avoid imposing criminal punishment on those engaging in advocacy, sharing of information about legally available services within or outside Idaho, or providing financial support either directly to pregnant persons in need of abortion care or to the organizations that seek to assist them.

Its impact on protected speech, communicative activity, and association is real. This impact is substantial, even when compared to those cases where I.C. § 18-623 may be constitutionally applied. Accordingly, I.C. § 18-623 is unconstitutionally overbroad.

IV. Idaho Code § 18-623 is unconstitutionally vague; it fails to adequately define what conduct is permissible as opposed to criminal, and it invites arbitrary and discriminatory enforcement

"In our constitutional order, a vague law is no law at all." *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319, 2323 (2019). These laws "contravene the 'first essential of due process law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *Id.* at 2325 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). In addition, a statute may be unconstitutionally vague if it accords police or prosecutors with sweeping, standardless discretion when it comes to interpreting and enforcing the law. "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Id.*

Where the statute at issue is criminal, a higher standard of scrutiny applies. A vague statute cannot be deemed constitutional merely because there is some conduct that clearly falls within the provision's grasp. *Johnson v. United States*, 576 U.S. 591, 602 (2015). The bar is also higher when the statute at issue is directed at speech and communications. "When speech is involved, rigorous adherence to those requirements is

necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Televisions Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

The vagueness analysis for a criminal statute does not and cannot occur in a vacuum. Instead, this Court looks to the combined effect of all aspects of indefiniteness within a statute to determine whether it complies with due process. While each of the individual uncertainties "may be tolerable in isolation," their sum can easily render the scope of a statute's application "guesswork." *Johnson*, 576 U.S. at 601-02.

Critically for this Court, the constitution does not countenance a legislative enactment that intentionally contains broad, ill-defined prohibitions that require court interpretation to give the law appropriate boundaries. "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v. Reese,* 92 U.S. 214, 221 (1876)). Yet, the legislative history for I.C. § 18-623 reflects that the Idaho legislators responsible for this bill intentionally left it to Idaho courts to provide I.C. § 18-623 definition.

When questioned about the conduct included within I.C. § 18-623, Idaho Senator Todd Lakey testified before the Idaho Senate Affairs Committee that, "recruiting, harboring, and transporting, those are descriptive words, **I guess the court would have to decide if the conduct constitutes one of those three things**." *See* 1-ER-069—70 (emphasis added). This statement, coming from the bill's co-sponsor, is in essence a concession that the exact scope of I.C. § 18-623's application was unknown, even to those who drafted and sponsored this legislation. The indefiniteness of its terms may have been by design, given the lack of any attempt to provide guidance as to the statute's meaning.

It takes little effort to comprehend the vagueness that permeates I.C. § 18-623 when one thinks about the numerous hypothetical situations in which it might be applied to otherwise seemingly innocent conduct. Consider a hypothetical in which a 17 year old girl, Jane, becomes pregnant and wants to know what legal options she may have if she decides to terminate her pregnancy. But Jane lives in a home where she fears her parents' condemnation and/or castigation if they were to find out. If Jane calls a clinic in a neighboring state where she can legally obtain an abortion without parental consent, can the clinic worker inform

Jane of this fact without violating I.C. § 18-623? Can the clinic worker set up an appointment if the worker finds out that Jane wishes to keep the fact of the abortion from her parents? If the worker is acting as an agent of the clinic, is the **clinic** criminally liable for the worker's acts as well?

What if Jane doesn't know how to get in touch with a clinic in another state, but asks a trusted school counselor for this information? After Jane shares her fears about what her parents might do if they found out about the pregnancy, and her intent to keep it a secret, would it be a crime for the school counselor to track down some contact information for health care providers in other states and give that information to Jane? Let's assume that Jane spoke to her spiritual advisor because she was severely depressed and felt like her future ambitions may be foreclosed due to the pregnancy. Jane's pastor, concerned for her well-being, wants Jane to know that she has options. If Jane's pastor shares information with her about the laws in states where Jane had the option of obtaining an abortifacient without parental consent, has the pastor violated I.C. § 18-623?

Jane may have already decided that she wishes to terminate her pregnancy without her parents' knowledge. Jane asks her friend, Cathy, if Jane can tell her parents that she will be staying at Cathy's house during the time she is traveling to another state. Even if Cathy never talks to Jane's parents, did she commit a felony if Cathy agrees? What if a co-worker agrees to take Jane's shift at the restaurant where they both work so Jane can travel. If Jane discloses the reason for her travel and confides in her co-worker that Jane doesn't want her parents to know, is her co-worker liable under I.C. § 18-623 by agreeing to cover Jane's shift?

What if a person who has never met Jane, but knows someone else who does, learns of her plight? For example, let's assume that Cathy talks to her own mother because Cathy is worried about her friend Jane. Cathy's mother is concerned too; she tells Cathy that it is ok for Jane to stay at their house overnight when she returns from her trip. If Cathy relays the message to Jane, are mother and daughter now co-conspirators in a scheme to violate I.C. § 18-623?

And even if, at the end of the day, Jane decides not to terminate the pregnancy, are each and every one of these people—the clinic worker (along with the clinic itself), the school counselor, the pastor, the friend,

the friend's mother, and the co-worker—still liable as principals? As co-conspirators? For an attempted commission of the abortion travel ban?

Turning to the role of undersigned *amicus*—how can defense attorneys make sense of this law and its prohibitions when advising others on what conduct remains legal? If, as a defense attorney, we are asked for legal counsel by a minor who wants to know her options for potentially terminating a pregnancy in another state, do we commit a felony if we provide that information? Are we guilty of an attempted commission of I.C. § 18-623 if we haven't yet conveyed this information, but have begun to research the laws in other states?

Under Idaho law, there is no attorney-client privilege when the advice of a lawyer has been "sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." *See* I.C.R. 502 (governing lawyer-client privilege). If one of our clients wants to help a friend, family member, neighbor, or even a stranger to obtain safe and legal abortion services, and seeks our advice as defense attorneys regarding their aims, can we invoke privilege for these discussions in a subsequent criminal prosecution under I.C. § 18-623? Would we be subject to criminal

contempt penalties for refusing to disclose the substance of these discussions?

There is nothing within I.C. § 18-623 that limits the discretion of police or prosecutors to charge any person who may offer even the most benign assistance to a minor who is seeking to obtain a legal abortion. The act of providing basic information about legal options to a pregnant minor is seemingly a potential criminal act. There may be felony criminal consequences even when information is provided by, and through the advice of, counsel; this itself represents an especially chilling danger.

Where the legislature fails to provide minimal guidelines to govern law enforcement, a criminal statute may result in a "'standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Any statute that "vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute" falls within the ambit of an unconstitutionally vague law. *Id.* Idaho Code § 18-623 is rife with potential for the arbitrary suppression of constitutional liberties, and its enforcement that may be entirely dependent on the subjective

inclinations of police and prosecutors. In light of this, it can only be properly deemed a vague law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am the attorney.

This brief contains 6,843 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature */s/ Jonah Horwitz* **Date** January 24, 2024
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing AMICUS BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth by using the appellate CM/ECF system on January 24, 2024. I certify that appellee in this case is a registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

Dated: January 24, 2024 /s/ Joy Fish
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