Nos. 11-36010, 11-36015

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIE LINN MCCORMACK,

Plaintiff-Appellee/Cross-Appellant,

v.

MARK L. HIEDEMAN,

Defendant-Appellant/Cross-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
(Hon. C.J. Winmill)

BRIEF OF *AMICI CURIAE* LEGAL VOICE, CENTER FOR REPRODUCTIVE RIGHTS, AND NATIONAL ADVOCATES FOR PREGNANT WOMEN IN SUPPORT OF APPELLEE

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STATEMENT OF *AMICI CURIAE*

Amici are three organizations knowledgeable about the history and law relating to the health and legal status of women in the United States and dedicated to enforcing the legal rights granted to women under the United States Constitution.

Legal Voice, formerly known as the Northwest Women's Law Center, is a regional non-profit public interest organization that works to advance the legal rights of all women through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to safe and legal abortion. Toward that end, Legal Voice has pursued legislation and has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country that seek to protect women's reproductive rights. Legal Voice opposes, and has successfully challenged, prosecutions of pregnant women for their pregnancy outcomes and works to end punitive measures that undermine the humanity and legal rights of all pregnant women. Legal Voice serves as a regional expert and leading advocate for reproductive freedom.

Center for Reproductive Rights is a national, non-profit, public interest organization dedicated to the advancement of reproductive rights under the United States Constitution and as fundamental human rights, both in the United States and throughout the world. The Center for Reproductive Rights' domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services. The Center for Reproductive Rights specializes in litigating reproductive rights cases throughout the United States and is currently lead or co-counsel in a majority of the reproductive rights litigation occurring across the nation.

National Advocates for Pregnant Women ("NAPW") is a non-profit organization that works to ensure the human rights, health, and dignity of all pregnant and parenting women. NAPW advocates for reproductive justice including the right to an abortion, the right to decide whether, when and how to carry a pregnancy to term, access to culturally appropriate and evidence-based medical care, and the right to parent the children one bears without inappropriate state intrusion and family disruption. NAPW joins this case as an amicus to explain to this Court that pregnant women who bear the risk of pregnancy and giving birth are not the same as third parties who perform unauthorized abortions.

Because pregnant women alone bear these risks, they should not be (and historically have not been) treated in the same ways as unauthorized third party abortion providers under the criminal law.

Amici submit this brief to provide a description of our national history as it relates to prosecuting pregnant women who terminate their own pregnancies. The brief will provide some historical context for the Idaho abortion laws at issue and demonstrate that the laws addressing abortion historically focused on regulating and punishing third parties who performed abortions—not the pregnant women who had them.

Contrary to what some have claimed,[1] before *Roe v. Wade*, 410 U.S. 113 (1973), women were sometimes arrested for having abortions,[2] but state abortion laws and those who enforced them nevertheless recognized that pregnant women

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[1] Clarke D. Forsythe, *Why the States Did Not Prosecute Women for Abortion Before Roe v. Wade*, Americans United for Life (Apr. 23, 2010), http://www.aul.org/2010/04/why-the-states-did-not-prosecute-women-for-abortion-before-roe-v-wade/ (claiming that no woman since 1591 has been arrested for having an abortion); Clarke D. Forsythe, *States Didn't Put Women in Jail for Abortions Before Roe, Won't If Overturned*, LIFENEWS.COM (Oct. 29, 2008), http://www.lifenews.com/2008/10/29/nat-45131.

[2] Jon Nordheimer, *She's Fighting Conviction for Aborting Her Child*, N.Y. TIMES, Dec. 4, 1971, at 37; *Commonwealth v. Weible*, 45 Pa. Super. 207 (1910); *2 Held in Abortion Ring*, N.Y. TIMES, Apr. 8, 1943, at 24; Brief for the *Amici Curiae* Women Who Have Had Abortions and Friends of *Amici Curiae* in Support of Appellees at app. B, letter 568, *Webster v. Reprod. Health Servs*., (No. 88-605), 492 U.S. 490 (1989).

who bear the risks to their lives and health during their pregnancies are fundamentally different from third parties (whether physicians or others) who perform abortions. Accordingly, pregnant women who obtain abortions have not typically been treated as the targets of state laws prohibiting and criminalizing abortion. Indeed, recognizing that, like Ms. McCormack, the vast majority of women who have abortions are already mothers, legislators, law enforcers, and courts did not want to see mothers transformed into criminals and locked up in jails and prisons. Significantly, even today, advocates who seek to overturn *Roe v. Wade* consistently claim that the laws re-criminalizing abortion will not be used to prosecute and punish the women who have them.[3]

A consideration of the circumstances of pregnancy, the history of abortion laws, public health interests, and the United States Constitution makes it clear what a radical departure it would be to interpret a state law to permit prosecution and imprisonment of women who terminate their own pregnancies.

Specifically, this brief explains that the historical policies underlying abortion regulations prior to the decision in *Roe v. Wade* involved efforts to

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[3] *See supra* n.1; *see also* Fr. Frank Pavone, *Jailing women who have abortions?*, LIFESITENEWS.COM (Nov. 23, 2011), http://www.lifesitenews.com/news/jailing-women-who-have-abortions/; NRO Symposium, *One Untrue Thing*, NAT'L REV. ONLINE (Aug. 1, 2007), http://www.nationalreview.com/articles/221742/one-untrue-thing/nro-symposium.

advance a state interest in protecting pregnant women's health and welfare; that the common law precluded criminal prosecutions of women for having abortions; and that historically states were reluctant to prosecute the pregnant women themselves. This history explains *why* pregnant women were not generally prosecuted for experiencing pregnancy losses and is further support for the district court's decision to enjoin enforcement of the Idaho laws that, as interpreted by the State, allow a woman to be subjected to criminal prosecution for any conduct that "purposely terminates her own pregnancy otherwise than by a live birth," Idaho Code § 18-606(2), or if she "cause[s] or perform[s] an abortion" herself. *Id.* § 18-608A ("It is unlawful for any person other than a physician to cause or perform an abortion."). Interpreting the Idaho statutes at issue here (*id.* §§ 18-606, 18-608, and 18-608A) to permit the prosecution of the women themselves is unjustified as a matter of policy and unconstitutional as a matter of law, particularly because such an interpretation places a substantial obstacle in the way of women exercising their fundamental, Constitutional rights.

This *amicus* brief is being filed with the parties' consent.

ARGUMENT

I. Historically, Laws Regulating Abortion Have Sought to Further the State's Interest in Protecting the Health and Welfare of Pregnant Women

An interpretation of Idaho law as allowing for the prosecution and punishment of women who terminate their pregnancies is far afield from one of the main purposes underlying the historical regulation of abortions. Abortion regulations have historically distinguished the women who bear the burdens of pregnancy from the people who perform abortions on pregnant women, and sought to advance pregnant women's lives and health by focusing on the regulation and punishment of those third parties who performed abortions. A review of this history demonstrates that Idaho law, as interpreted by the State in this case, is a radical departure from that history and would undermine, rather than further, state interests in pregnant women's and public health.

A. Women Alone Bear the Burden and Risks of Pregnancies

The United States Supreme Court has long recognized that pregnant women alone bear the burdens of pregnancy. It is precisely because women experience the physiological and psychological burdens of pregnancy that the Supreme Court recognized the right to choose to have an abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Moreover, the Court has made it clear that a pregnant woman's life and health are of paramount importance at all stages of pregnancy. *Planned*

Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); *see also Roe*, 410 U.S. at 163-164. As the Supreme Court recognized in *Casey*, a pregnant woman is "subject to anxieties, to physical constraints, to pain that only she must bear." 505 U.S. at 852.

By age twenty-five, approximately half of all women in the United States have become pregnant and experienced at least one birth. Ctrs. for Disease Control & Prevention, 55 (No. RR-6) Morbidity and Mortality Weekly Report 2, *Recommendations to Improve Preconception Health and Health Care –United States: A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care* (Apr. 21, 2006), *available at* http://www.cdc.gov/mmwr/PDF/rr/rr5506.pdf (hereinafter "*Recommendations to Improve Preconception Health and Health Care –United States*"). By age forty-four, approximately 85 percent of women have become pregnant and experienced at least one birth. *Id.* This, however, does not mean that every pregnancy results in a live birth. Conservative estimates show that as many as 15 to 20 percent of all pregnancies end in miscarriage. Raj Rai & Lesley Regan, *Recurrent Miscarriage*, 368 THE LANCET 601 (Aug. 2006); Claudia Malacrida, *Complicating Mourning: The Social Economy of Perinatal Death*, 9(4) Qualitative Health Res. 504, 505 (1999). In fact, some estimate that a much higher number of pregnancies, as many

as 40 percent, end in miscarriage. A significant number of these are not recorded because these losses occur before a woman realizes she is pregnant. March of Dimes, *Loss and Grief: Miscarriage* 1 (Oct. 2008), http://www.marchofdimes.com/professionals/14332_1192.asp#head1. In addition to pregnancies that end in miscarriage, other pregnancies end in stillbirth—approximately 26,000 pregnant women experience stillbirth pregnancies each year.[4] R.L. Goldenberg et al., *Stillbirth: a review*, 16 J. OF MATERNAL-FETAL & NEONATAL MED. 79 (2004); Ruth C. Fretts, *Etiology and prevention of stillbirth*, 193 AM. J. OF OBSTETRICS & GYNECOLOGY 1923, 1924 (Mar. 2005).

In addition to pregnancies that end in miscarriage and stillbirth, other pregnancies end through abortion. *Recommendations to Improve Preconception Health and Health Care—United States*. It is estimated that more than one-third of women will have had an abortion by the age of forty-five. Guttmacher Inst., *An Overview Of Abortion In The United States*, (2011), http://www.guttmacher.org/media/presskits/2005/06/28/abortionoverview.html.

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[4] American medical researchers commonly draw the line distinguishing between miscarriages and stillbirths at 20 weeks gestation or a birth weight greater than 350 grams. R.L. Goldenberg et al., *Stillbirth: a review*, 16 J. OF MATERNAL-FETAL & NEONATAL MED. 79, 80 (2004).

The population of women who end their pregnancies through abortion share certain characteristics with the population of women who carry a fetus to term and experience a live birth. Like Ms. McCormack, the majority of women who have abortions are already mothers: 61 percent of the women who had abortions in 2008 already had one or more children. Rachel K. Jones, et al., *Characteristics of U.S. Abortion Patients*, 2008 (May 2010), *available at* http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf; *see also* NAT'L CTR. HEALTH STATISTICS, *Health*, *United States, 2010* 181 (2010) (with Chartbook) (stating that in 2004, 77 percent of women receiving abortions had already experienced at least one live birth).

Pregnancy and childbirth remain life-risking events in the United States. According to Amnesty International,

> More than two women die every day in the USA from complications of pregnancy and childbirth. . . . [Women] in the USA have a greater risk of dying of pregnancy-related complications than those in 40 other countries. For example, the likelihood of a woman dying in childbirth in the USA is five times greater than in Greece, four times greater than in Germany, and three times greater than in Spain. More than two women die every day in the USA from pregnancy-related causes.

Amnesty Int'l, *USA: Deadly Delivery: The Maternal Health Care Crisis in the USA: Summary 3*, AMR 51/019/2010 (Mar. 12, 2010),

http://www.amnesty.org/en/library/info/AMR51/019/2010/en (last visited Feb. 3, 2012). Over the past decade, maternal mortality in the United States has been on the rise. Hsiang-Ching Kung, et al., *Deaths: Final Data for 2005*, 56(10) NAT'L VITAL STAT. REP. (Apr. 2008), http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_10.pdf; Ctrs. for Disease Control & Prevention, *Healthy People 2010: Objectives for Improving Health* 16-23 (2000), http://www.healthypeople.gov/2010/Document/pdf/Volume2/16MICH.pdf (click through to archive site). Evaluations of the safety of abortion relative to childbirth have consistently shown that abortion is safer than childbirth. *See*, *e.g.*, Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (Feb. 2012).

B. Laws Barring or Regulating Abortion Historically Have Sought to Protect Pregnant Women's Health and Welfare

As explained below, instead of treating pregnant women seeking abortions as murderers, culprits or criminals, the law has historically viewed and treated these women as a group warranting support and protection. Because abortions were once perilous and could result in the death of the patient, regulations were enacted for "the protection of . . . pregnant females." *Gaines v. Wolcott*, 119 Ga.

App. 313, 167 S.E.2d 366, 370, *aff'd*, 169 S.E.2d 165 (Ga. 1969). And, historically, when laws did criminalize abortion, the laws targeted the third parties who performed unlawful abortions, not the pregnant women themselves, because a primary purpose of these laws was to protect such women from third parties providing dangerous abortions.

As one district court stated, "abortions performed before [1867], even under the best of then known medical practices, created grave risks for the health and life of the mother. There can be no doubt that this was an evil known to and appreciated by the Nineteenth Century legislators." *Abele v. Markle*, 342 F. Supp. 800, 806 (D.C. Conn. 1972), *judgment vacated*, 410 U.S. 951 (1973) (vacating and remanding for consideration of mootness). Indeed, "the appalling, unsanitary and unprofessional conditions under which such illegal operations are in fact often performed warrant the protection of the law to the women." *Gaines*, 167 S.E.2d at 369; *see also People v. Nixon*, 42 Mich. App. 332, 201 N.W.2d 635, 639 (1972) ("The obvious purpose [of the abortion statute enacted in 1846] was to protect the pregnant woman. When one remembers that the passing of the statute predated the advent of antiseptic surgery, the Legislature's wisdom in making criminal any invasion of the woman's person, save when necessary to preserve her life, is unchallengeable.").

While *Roe* recognized that modern medicine had made abortion as safe as other medical procedures, 410 U.S. at 149-51, there, the Supreme Court was faced with addressing the legality of abortion laws following decades of abortion prohibition that had made it particularly unsafe. Rosalind Pollack Petchesky, *Abortion & Woman's Choice: The State, Sexuality, & Reproductive Freedom*, 80 (1984) ("Indeed, many physicians acknowledged that abortion was relatively safe and that only its illegality and practice under unhygienic conditions made it dangerous."). Despite the laws criminalizing abortion, it was estimated that anywhere from 200,000 to 1,200,000 women each year had abortions, many from dangerous and unqualified people. *See* Warren M. Hern, *Abortion Practice* 17-20 (1984); *see also* Malcom Potts, et al., *Abortion* 87-89 (1977); Willard Cates, *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982). As a result, the Court recognized the continuing significant interest of the health of the mother. *Roe*, 410 U.S. at 162-63.[5] Subsequent Supreme Court opinions have also acknowledged the importance of the health and lives of pregnant women as a consideration in evaluating the constitutionality of regulations on abortion. *See,*

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[5] *Roe v. Wade* did not address the constitutionality of laws that would permit the prosecution of women who have abortions that were unauthorized by state law, though the Court did conclude that laws that criminalize abortions in all circumstances—as did Idaho law prior to the decision in *Roe*—were unconstitutional. 410 U.S. at 166.

e.g., *Casey*, 505 U.S. at 846 (stating that in substantive due process challenge to abortion regulations, an important principle is "that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman"); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 489-90, (1983) (upholding regulation requiring a pathology report before an abortion is conducted based on the goal of "protection of a woman's health"); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 76 (1976) (finding ban on safe abortion procedure did not protect women's health and was unconstitutional).

C. At Common Law, Pregnant Women Were Not Criminally Liable for Their Decisions to End Pregnancies

In contrast to criminal laws that targeted third parties who performed abortions, common law generally did not subject women to criminal liability for terminating their own pregnancies. "At common law, while a third party could be held criminally liable for causing injury or death to a fetus, the pregnant woman could not be." *State v. Ashley*, 701 So. 2d 338, 340 (Fla. 1997) (citing *State v. Carey*, 76 Conn. 342, 56 A. 632, 636 (1904)); *see also Hillman v. State*, 232 Ga. App. 741, 503 S.E.2d 610, 611-12 (1998) (holding that a woman cannot be criminally prosecuted for self-abortion).

Consistent with the common law, many criminal codes expressly exempt women from criminal liability for obtaining an abortion and do not hold them

liable for actions or inactions that affect their pregnancy outcomes.[6] Indeed, when the Idaho legislature recently enacted Section 18-505 banning abortions after

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[6] *See e.g.,* Alaska Stat. § 11.41.289 (liability for "assault of an unborn child" does not apply to actions "committed by a pregnant woman against herself and her own unborn child"); Ark. Code Ann. §§ 5-61-101(c), 5-61-102(c) ("Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero."); Cal. Penal Code § 187 (stating that liability for murder applies only to the physician); Fla. Stat. § 782.36 ("A patient receiving a partial-birth-abortion procedure may not be prosecuted under this act."); Ga. Code Ann. § 16-12-140(a); *Hillman*, 232 Ga. App. at 741-42 (interpreting Georgia's "criminal abortion" law as not applying to the pregnant woman); 720 Ill. Comp. Stat. 5/9-1.2(b), formerly Ill. Rev. Stat 38, § 9-1.2 (criminal liability for intentional homicide of an unborn child does not apply to "the pregnant woman whose unborn child is killed"); Kan. Stat. Ann. § 65-6703(e) ("A woman upon whom an abortion is performed shall not be prosecuted under this section[.]"); Ky. Rev. Stat. Ann. § 507A.010(3) ("Nothing in this chapter shall apply to any acts of a pregnant woman that caused the death of her unborn child."); La. Rev. Stat. Ann. § 14:87 (penalties for criminalized abortions not applicable to pregnant women having abortions); Minn. Stat. § 609.266 (excluding "the pregnant woman" from liability for "crimes against unborn children"); Neb. Rev. Stat. § 28-335 (providing "[n]o civil or criminal penalty . . . against the patient upon whom the abortion is performed"); Ohio Rev. Code Ann. § 2919.17(I) (expressly excluding woman from liability for post-viability abortions); 18 Pa. Cons. Stat. Ann. § 2608 (exempting pregnant woman from liability "in regards to crimes against her unborn child"); Tex. Penal Code Ann. § 19.06(1) (exempting the woman from liability for "death of an unborn child"); Utah Code Ann. § 76-5-201(4) (providing woman is not guilty of criminal homicide for death of fetus under certain circumstances), § 76-7-314.5(2) ("A woman is not criminally liable for (a) seeking to obtain, or obtaining, an abortion that is permitted by this part; or (b) a physician's failure to comply [with specified statutes.]"); Vt. Stat. Ann. tit. 13 § 101 ("However, the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section."); Wis. Stat. Ann. § 940.13 (providing no fine or imprisonment for woman who obtains an abortion or violates any provision of an abortion statute).

twenty weeks, consistent with the understanding that women seeking abortions should not be criminalized, it included an exception for "the woman upon whom the abortion is performed or attempted to be performed."[7] *See* Idaho Code § 18-507. Although there is a small number of states that still have statutes authorizing criminal liability for women who exercise their right to terminate their pregnancies, *see e.g.* N.Y. Penal Law §§ 125.20, 125.55 (making "self-abortion" a misdemeanor), such statutes directly contradict the decades-old justification for abortion regulations: protecting the woman's health from unqualified or dangerous third parties who perform abortions.

Likewise, courts have recognized the principle that the pregnant women who face the risks of pregnancy are in a very different position than the third parties who perform abortions and thus, should be treated differently with respect to liability. The risks of childbirth include "danger to life and health" as well as the "psychological and social adjustments" of "raising a child," and the obvious challenges to a family's "financial [and] emotional resources"; in sum, the

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[7] Idaho Code Sections 18-505 and 18-507 were added by S.L. 2011, ch. 324, § 1 (Apr. 13, 2011). Section 18-507 provides: "Any person who intentionally or recklessly performs or attempts to perform an abortion in violation of the provisions of section 18-505, Idaho Code, is guilty of a felony. No penalty shall be assessed against the woman upon whom the abortion is performed or attempted to be performed."

"decision to carry and bear a child has extraordinary ramifications for a woman," far different from those faced by a third party healthcare provider. *Abele*, 342 F. Supp. at 801-02; *see also Roe*, 10 U.S. at 153 (noting detriments that women may experience from carrying a pregnancy to term); *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d, 355, 358-61 (1988) (in context of rejecting creation of a tort of maternal prenatal negligence, distinguishing between imposing liability on a third party for harm to a fetus and imposing liability on the pregnant woman herself).

Courts have extended the common law principle insulating pregnant women from liability to pregnant women who attempted to end their pregnancies with the assistance of another person. *See Thompson v. State*, 493 S.W.2d 913, 915 (pregnant woman not an accomplice though she consented to the abortion), *vacated and remanded*, 410 U.S. 950 (1973) (vacating and remanding for consideration of mootness); *Basoff v. State*, 208 Md. 643, 119 A.2d 917, 923 (1956) (recognizing that "it may seem illogical to hold that a pregnant woman who solicits the commission of an abortion and willingly submits to its commission upon her own person is not an accomplice in the commission of the crime, yet many courts in the United States have adopted this rule" and collecting cases); *State v. Prude*, 76 Miss. 543, 24 So. 871 (1899) (abortion statute does not apply to

woman who intentionally tried to abort the fetus). The United States Supreme Court endorsed this conclusion in 1915, reasoning that while a pregnant woman could "conspire to procure an abortion," for liability purposes, "under the law, she could not commit the substantive crime; and therefore, it has been held could not be an accomplice." *United States v. Holte*, 236 U.S. 140, 145 (1915).

The Idaho Supreme Court has likewise agreed that a pregnant woman could not be an accomplice to her own abortion. In *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954), the court affirmed the conviction of a third party (not the woman) for performing an abortion. The defendant appealed, arguing that the testimony of an accomplice must be corroborated and that, in his case, the witness to the abortion and the victim were accomplices and could not corroborate each other. *Id.* at 64. The Idaho Supreme Court rejected the argument that the pregnant woman was an accomplice to the person who performed the abortion: "[I]t is plainly apparent that the victim is not, in a legal sense, an accomplice of appellant in the commission of the [abortion]." *Id.*

In sum, courts from the United States Supreme Court to the Idaho Supreme Court have consistently recognized that it would not be appropriate to hold women criminally liable for their decision to terminate their pregnancies. Yet Idaho's

penal law at issue in this case runs directly contrary to this history and tradition by imposing criminal liability and felony penalties on pregnant women themselves.

D. Idaho Code §§ 18-606 and 18-608A Are Contrary to Well-Established Common Law

According to the prosecution, Idaho Code Section 18-606 clearly permits prosecution and punishment of pregnant women both in obtaining an abortion not authorized by the statute and in terminating their own pregnancies. *See* Br. of Appellant at 7-8. Idaho Code Section 18-606 provides:

> Except as permitted by this act . . .
>
> (2) Every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony and shall be fined not to exceed five thousand dollars ($5,000) and/or imprisoned in the state prison for not less than one (1) and not more than five (5) years; provided, however, that no hospital, nurse, or other health care personnel shall be deemed in violation of this section if in good faith providing services in reliance upon the directions of a physician or upon the hospital admission of a patient for such purpose on the authority of a physician.

This felony statute is directly contrary to the common law rule that a pregnant woman is not criminally liable for obtaining an abortion.

Idaho Code Section 18-608A is another vehicle by which pregnant women could be held criminally liable when they, alone, terminate their pregnancies. It

provides, in full: "It is unlawful for any person other than a physician to cause or perform an abortion." Idaho Code § 18-608A. "Abortion" is defined as "the use of any means to intentionally terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." *Id.* § 18-604(1). Thus, if a pregnant woman terminates her pregnancy in an otherwise lawful and safe manner (for example, by taking a medication lawfully prescribed to her by her physician), it appears that she might nonetheless be criminally liable for violating Section 18-608A. Though Idaho Code § 18-608 contains certain exemptions from liability depending on the trimester, those apply only to *physicians*, not to the pregnant women themselves. *Compare* Idaho Code § 18-608 *with* § 18-608A.

Though of course states may and do repeal the common law through legislation, they cannot legally do so if the resulting statute violates the United States Constitution.

II. Idaho Code §§ 18-606 and 18-608A, in Conjunction with Section 18-608, Are Unconstitutional

A. By Making Women Criminals if They Seek or Obtain Abortions, or Self-Abort, Idaho Code §§ 18-606 and 18-608A Place an Undue Burden on Pregnant Women

Almost four full decades after *Roe v. Wade*, 410 U.S. 113 (1973), it is well-established that the right of privacy, grounded in the constitutional concept of

personal liberty, includes a woman's right to decide to terminate her pregnancy. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits state imposition of any undue burden on a women's right to obtain a previability abortion. *Casey*, 505 U.S. at 876-77. In short, a state regulation that "has the purpose or effect of *placing a substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus" constitutes an "undue burden" and is unconstitutional. *Casey*, 505 U.S. at 877 (emphasis added).

As this Court recognized almost two decades ago in rejecting a law similar to Idaho's, "*surely* an outright criminalization of abortion places an 'undue burden' on the exercise of the woman's right." *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1373 (9th Cir. 1992) (emphasis added) (overturning 9 Guam Code Ann. § 31.22). Like the Idaho law at issue here, the Guam law struck down in *Ada* criminalized pregnant women's conduct in relation to their own abortions, though the Guam law went even further by outlawing "almost all abortions." 962 F.2d at 1368. In affirming the district court's decision enjoining enforcement of the law, this Court emphasized that "the right of a woman not to be forced to endure a pregnancy and birth is an extremely important one. Pregnancy entails profound physical, emotional, and psychological consequences." *Id.* at 1373 (internal quotation marks and citations omitted).

Under the prosecution's reading of the Idaho law, any woman who knowingly submits to or solicits an abortion that does not meet the state's regulations, and any woman "who purposely terminates her own pregnancy otherwise than by a live birth[,]" has committed a felony under Idaho Code Section 18-606. In addition, Section 18-608A makes it unlawful "for any person other than a physician to cause or perform an abortion." Both of these statutes appear to make it unlawful for a woman to terminate her pregnancy by seeking or obtaining an abortion performed by someone else or by performing an abortion on herself, including by ingesting FDA-approved medication. The "outright criminalization of abortion" by these provisions clearly places a substantial obstacle in the way of pregnant women seeking abortions in Idaho and therefore the statutes are unconstitutional.[8]

[8] Moreover, the impact of making a pregnant woman herself criminally liable for having an abortion is likely to be especially burdensome in Idaho, where as of 2008 there were only four known providers of abortions (down from seven, three years before), 95 percent of the counties were without any abortion provider, and 64 percent of women between the ages of fifteen and forty-four lived in counties with no provider. *See* Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 41, 45 (Mar. 2011), *available at* http://www.guttmacher.org/pubs/journals/4304111.pdf (last visited Feb. 6, 2012).

B. Idaho Code Sections 18-606 and 18-608A Suffer from Constitutional Infirmities in Addition to Those Identified by the District Court

Amici not only ask this Court to affirm the decision below because of the constitutional infirmities in Idaho's laws that the district court identified, but also note that these laws suffer from additional infirmities.

Section 18-606 violates the Fourteenth Amendment's Due Process Clause on the ground of vagueness. A statute is void for vagueness if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). When read in conjunction with the definition of "abortion" in Section 18-604, it is unclear whether Section 18-606's criminalization of a woman who "purposely terminates her own pregnancy otherwise than by a live birth," might also be read as prohibiting women from using "an intrauterine device or birth control pill to inhibit or prevent ovulations, fertilization or the implantation of a fertilized ovum within the uterus." Idaho Code § 18-604(1) (stating that the term "abortion" as used in the statute does not include such uses). Because the law is unclear, it causes an unnecessary amount of uncertainty for women in Idaho and delegates to police and prosecutors just the kind of arbitrary enforcement that the vagueness

doctrine forbids. Of course, if Section 18-606 *were* read to prohibit women from using birth control methods, such a prohibition would be unconstitutional as violations of the rights to privacy and liberty. *See, e.g.*, *Carey v Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (applying strict scrutiny analysis to find law restricting distribution of contraceptives unconstitutional under Due Process Clause of Fourteenth Amendment).

Moreover, the language in Idaho Code § 18-606(2) that, according to the prosecution, would permit the arrest of a woman who "purposely terminates her own pregnancy otherwise than by a live birth" would delegate to law enforcement officers and prosecutors the authority to determine whether the many women who experienced miscarriages and stillbirths each year did so purposely. *See, e.g.*, *Reinesto v. Superior Court*, 182 Ariz. 190, 894 P.2d 733 (1995); *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010) (both discussing innumerable intentional and purposeful actions by pregnant women that may affect pregnancy outcome). Indeed, in other states and under various criminal laws prosecutions have been brought that were based upon a woman's actions while pregnant and the fact that a pregnancy loss occurred. *See, e.g.*, Ed Pilkington, *Outcry in America as pregnant women who lose babies face murder charges*, THE GUARDIAN (June 24, 2011), http://www.guardian.co.uk/world/2011/jun/24/america-pregnant-women-

murder-charges (reporting on *State of Indiana v. Bei Bei Shuai*, No. 49G03-1103-MR-014478 (Marion Cnty. Mar. 14, 2011), a prosecution brought for intentional murder and feticide after pregnant woman attempted suicide; and *Gibbs v. State of Mississippi*, No. 2010-IA-00819-SCT (Miss. S. Ct. Oct. 27, 2011), where a pregnant teenager was charged with murder after experiencing a stillbirth allegedly caused by use of cocaine); *cf. State v. Davis*, No. C-5109-B (Idaho Dist. Ct. Bannock Cnty. Sept. 12, 1990) (mother who allegedly used cocaine during pregnancy charged with willful criminal injury to a child).

It is also important to note that laws penalizing women because of pregnancy not only implicate due process rights but also equal protection rights. Laws criminalizing abortion have a sex-specific impact. As one scholar has aptly and succinctly noted, "[a]lthough both men and women seek to control reproduction, only women become pregnant. Only women have abortions. Laws restricting access to abortion have a devastating sex-specific impact." Sylvia A. Law, *Rethinking Sex And the Constitution*, 132 U. PA. L. REV. 955, 981 (1984). Therefore, the Idaho statutes at issue here also implicate the right to equal protection under the Fourteenth Amendment.

CONCLUSION

Prosecuting women in relation to their own pregnancies, including for their efforts to end them, is a radical departure from the common law and fails to advance the state's interest in supporting and protecting maternal health. Laws that permit the prosecution of pregnant women who terminate their own pregnancies also impose an undue burden. These laws are patently unconstitutional. This Court should affirm the judgment below enjoining the enforcement of the Idaho laws should be affirmed.

DATED: February 7, 2012

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**CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBERS 11-36010 AND 11-36015**

I certify that: (check appropriate option(s))

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STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Ninth Circuit Rules, *amici curiae* state that they are aware of no related cases pending before this Court.

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number(s): 11-36010 and 11-36015

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 7, 2012.

I certify that participants in the case who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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