STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

July 25, 2024

Via Electronic Filing

Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Matsumoto, et al. v. Labrador,* Case No. 23-3787
Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j) & Circuit R. 28-6.

Dear Ms. Dwyer:

In *Moody v. Netchoice, LLC*, the Supreme Court clarified the standard applicable to facial challenges to State laws under the First Amendment.

There are three steps federal courts conduct on a First Amendment facial challenge. First, courts assess the state law's scope. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2398 (2024). To find the scope, they ask: "What activities, by what actors, do[es] the law[] prohibit or otherwise regulate?" *Id.* Second, courts must determine which of the law's applications, if any, violate the First Amendment. *Id.* And third, courts then measure those First Amendment infringing applications against the rest. *Id.* A state law will survive a facial challenge in all instances except where "the law's unconstitutional applications substantially outweigh its constitutional ones." *Id.* at 2397. In that circumstance alone—and "only" that one—may a court facially enjoin a state law. *Id.*

Plaintiffs have brought only a facial challenge to Idaho Code § 18-623. And the district court facially enjoined the law. But neither Plaintiffs nor the district court have shown that Section 18-623 can be facially enjoined. Most, if not all, of the activities Plaintiffs say they want to engage in are not prohibited by the law. And any of the few activities Plaintiffs may want to undertake that are regulated by the law—like transporting a minor without parental consent to receive an abortion—do not substantially outweigh the law's full scope of permissible applications. Even weighing

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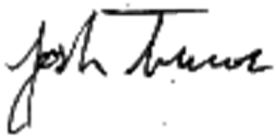
just Plaintiffs' desired activities, the Court cannot say that the law's unconstitutional applications outweigh the law's permissible applications, let alone substantially does so. And when considered with everyone in view, Plaintiffs cannot possibly meet "rigorous standard" for facial challenges under the First Amendment. *Id.*

Here, Plaintiffs chose to litigate their case as a facial challenge, "and that decision comes at a cost." *Id.* The preliminary injunction facially enjoining the law in all of its applications should be vacated.

The body of this letter contains 318 words.

Respectfully submitting,



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