

Idaho

Moyle et al., v. US (No. 23-726), *Idaho v. US* (No. 23-727), 603 U.S. (2024). Supreme Court vacated the stay and dismissed the Writ of Certiorari before judgement as improvidently granted. The court’s ruling sends the case back to the F. Dis. Ct. ID to proceed with litigation and reinstates the lower court’s preliminary injunction. See *US v. Idaho*, 623 F. Supp. 3d 1096 (D. Idaho 2022) below.

Matsumoto v. Labrador, U.S. Ct. App., 9th Cir. (2024). The Court affirmed in part and reversed in part the district court’s preliminary injunction enjoining Idaho’s “abortion trafficking” [Idaho Code § 18-623](#). The court affirmed the district court’s preliminary injunction preventing the Idaho attorney general from enforcing the “recruiting” prong of §18-623 based upon constitutional grounds. The Court upheld the “harboring” and “transporting” prongs of the statute. See [Idaho Code § 18-623 infra](#).

[United States v. Idaho, 623 F. Supp. 3d 1096 \(D. Idaho 2022\)](#) The F. Dis. Ct. ID, Winmill, J., issued a preliminary injunction regarding a provision of Idaho’s abortion statute on preemption grounds. The Idaho law, ID Code Ann. S. 18-622(2 (a)(i) (Supp. 2023) prohibits abortion unless necessary to prevent the pregnant person’s death and conflicts with the federal law, EMTALA (Emergency Medical Treatment and Labor Act) (42. U.S.C. s. 1395dd) that requires Medicare-funded hospitals provide necessary stabilizing treatment for emergency medical conditions.

Planned Parenthood Great Nw. v. State, Nos. 49615, 49817,49899, (January 5, 2023), available at: <https://isc.idaho.gov/opinions/49615xxx.pdf> (consolidating cases, Idaho Supreme Court holding Idaho Constitution does not contain a fundamental right to abortion. The Total Abortion Ban, 6-Week Ban, and Civil Liability Law are constitutional)

Planned Parenthood Great Nw. v. State, Nos. 49615, 49817, 49899, 2022 Ida. LEXIS 94, at *1-2 (Aug. 12, 2022) (consolidating cases, denying stay of Idaho Code section 18-622, and scheduling oral argument)

18-605. Unlawful abortions — Procurement of — Penalty.

(1) Every person not licensed or certified to provide health care in Idaho who knowingly, except as permitted by this chapter, provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent thereby to cause or perform an abortion shall be 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 two (2) and not more than five (5) years.

(2) Any person licensed or certified to provide health care pursuant to title 54, Idaho Code, and who knowingly, except as permitted by the provisions of this chapter, provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent to cause or perform an abortion shall:

(a) For the first violation, be subject to professional discipline and be assessed a civil penalty of not less than one thousand dollars (\$1,000), payable to the board granting such person’s license or certification;

(b) For the second violation, have their license or certification to practice suspended for a period of not less than six (6) months and be assessed a civil penalty of not less than two thousand five hundred dollars (\$2,500), payable to the board granting such person's license or certification; and
(c) For each subsequent violation, have their license or certification to practice revoked and be assessed a civil penalty of not less than five thousand dollars (\$5,000), payable to the board granting such person's license or certification.

(3) Any person who is licensed or certified to provide health care pursuant to title 54, Idaho Code, and who knowingly violates the provisions of this chapter is guilty of a felony punishable as set forth in subsection (1) of this section, separate from and in addition to the administrative penalties set forth in subsection (2) of this section.

[Idaho Code § 18-605](#)

Idaho Code § 18-606. Unlawful abortions — Accomplice or accessory — Submitting to — Penalty.

Except as permitted by this act:

(1) Every person who, as an accomplice or accessory to any violation of section 18-605[, Idaho Code], induces or knowingly aids in the production or performance of an abortion; and

(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.

18-607. Abortifacients — Unauthorized sale.

A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(1) The sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(2) The same is made upon prescription or order of a physician; or

(3) The possession is with intent to sell as authorized in paragraphs (1) and (2) of this section; or

(4) The advertising is addressed to persons named in paragraph (1) of this section and confined to trade or professional channels not likely to reach the general public.

[Idaho Code § 18-607](#)

Idaho Code § 18-608. Certain abortions permitted — Conditions and guidelines.

(1) Abortions shall only be lawful if and when performed in a hospital or in a physician's regular office or a clinic, which office or clinic is properly staffed and equipped for the performance of such procedures and respecting which the responsible physician or physicians have made satisfactory arrangements with one (1) or more acute care hospitals within reasonable proximity thereof providing for the prompt availability of hospital care as may be required due to complications or emergencies that might arise.

(2) An abortion performed upon a woman who is in the second trimester of pregnancy shall only be lawful if the same is performed in a hospital.

(3) An abortion performed upon a woman who is in the third trimester of pregnancy shall only be lawful if the same is performed in a hospital and, in the judgment of the attending physician, corroborated by a like opinion of a consulting physician concurring therewith, either is necessary for the preservation of the life of such woman or, if not performed, such pregnancy would terminate in birth or delivery of a fetus unable to survive. Third-trimester abortions undertaken for preservation of the life of a pregnant patient, as permitted by this subsection, shall, consistent with accepted medical practice and with the well-being and safety of such patient, be performed in a manner consistent with preservation of any reasonable potential for survival of a viable fetus.

(4) Nothing in this section shall make legal any abortion that is otherwise illegal under any other law of this state, including section 18-622, Idaho Code.

18-613. Partial-birth abortions prohibited.

(1) Prohibited acts. Any physician who knowingly performs a partial-birth abortion and thereby kills a human fetus shall be subject to the penalties imposed in section 18-605, Idaho Code. This section shall not apply to partial-birth abortions necessary to save the life of the mother when her life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) Definitions. As used in this section:

(a) "Fetus" has the same meaning as provided in section 18-604(5), Idaho Code.

(b) "Partial-birth abortion" means an abortion in which the person performing the abortion:

(i) Deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the physician knows will kill the partially delivered living fetus;
and

(ii) Performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

(c) "Physician" has the same meaning provided in section 18-604, Idaho Code. However, any individual who is not a physician or not otherwise legally authorized by this state to perform abortions but who nevertheless directly performs a partial-birth abortion shall be subject to the provisions described in this section.

(3)

(a) Civil actions. The father of the aborted fetus, if married to the mother of the aborted fetus at the time of the partial-birth abortion, or the maternal grandparents of the aborted fetus, if the mother is not at least eighteen (18) years of age at the time of the abortion, may bring a civil action against the defendant physician to obtain appropriate relief. Provided however, that a civil action by the father is barred if the pregnancy resulted from the father's criminal conduct or if the father consented to the abortion. Further, a civil action by the maternal grandparents is

barred if the pregnancy is the result of a maternal grandparent's criminal conduct or if a maternal grandparent consented to the abortion.

(b) As used in this section, "appropriate relief" shall include:

(i) Money damages for all mental and physical injuries suffered by the plaintiff as a result of the abortion performed in violation of this section;

(ii) Money damages equal to three (3) times the cost of performing the abortion procedure.

(4)

(a) Hearing. A physician accused of violating this section may request a hearing before the state board of medicine on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(b) The findings of the board of medicine regarding the issues described in paragraph (a) of this subsection are admissible at the criminal and civil trials of the defendant physician. Upon a motion by the defendant physician, the court shall delay the beginning of the criminal and civil trials for not more than thirty (30) days to permit the hearing to take place.

(5) Immunity. A woman upon whom a partial-birth abortion is performed shall not be prosecuted for violations of this section, for conspiracy to violate this section, or for violations of section 18-603, 18-605 or 18-606, Idaho Code, in regard to the partial-birth abortion performed.

Idaho Code § 18-614. Defenses to prosecution.

(1) No physician shall be subject to criminal or administrative liability for causing or performing an abortion upon a minor in violation of subsection (1) of section 18-609A, Idaho Code, if prior to causing or performing the abortion the physician obtains either positive identification or other documentary evidence from which a reasonable person would have concluded that the woman seeking the abortion was either an emancipated minor or was not then a minor and if the physician retained, at the time of receiving the evidence, a legible photocopy of such evidence in the physician's office file for the woman.

(2) For purposes of this section, "positive identification" means a lawfully issued state, district, territorial, possession, provincial, national or other equivalent government driver's license, identification card or military card, bearing the person's photograph and date of birth, the person's valid passport or a certified copy of the person's birth certificate.

Idaho Code § 18-615. Criminal act to coerce or attempt to coerce a woman to obtain an abortion.

(1) A person violates the provisions of this section when, knowing that a woman is pregnant, and with the intent to induce the pregnant woman to abort, whether by a medical procedure or otherwise:

(a) Threatens to inflict physical injury or death on the pregnant woman; or

(b) Conspires to inflict physical injury or death on the pregnant woman; or

(c) Unlawfully inflicts physical injury on the pregnant woman.

(2) A pregnant woman injured by reason of a person's violation of the provisions of this section may bring a civil suit for recovery of damages for such injury, whether or not the perpetrator is criminally prosecuted or convicted. In such a civil suit, the pregnant woman shall be entitled to recover her reasonable attorney's fees and costs if she is the prevailing party.

(3) Violations of the provisions of this section are classified and punishable as follows:

(a) A violation of subsection (1)(a) or (1)(b) of this section constitutes a misdemeanor punishable by not more than six (6) months in jail, or a fine of not more than one thousand dollars (\$1,000), or both.

(b) A violation of subsection (1)(c) of this section constitutes a felony punishable by imprisonment for not more than five (5) years, or a fine of not more than five thousand dollars (\$5,000), or both.

(4) The term "physical injury" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by physical force.

(5) The term "woman" includes a minor female.

18-617. Chemical abortions.

(1) As used in this section:

(a) "Abortifacient" means mifepristone, misoprostol and/or other chemical or drug dispensed with the intent of causing an abortion as defined in section 18-604(1), Idaho Code. Nothing in the definition shall apply when used to treat ectopic pregnancy;

(b) "Chemical abortion" means the exclusive use of an abortifacient or combination of abortifacients to effect an abortion;

(c) "Physician" has the same meaning as provided in section 18-604(12), Idaho Code.

(2) No physician shall give, sell, dispense, administer, prescribe or otherwise provide an abortifacient for the purpose of effecting a chemical abortion unless the physician:

(a) Has the ability to assess the duration of the pregnancy accurately in accordance with the applicable standard of care for medical practice in the state;

(b) Has determined, if clinically feasible, that the unborn child to be aborted is within the uterus and not ectopic;

(c) Has the ability to provide surgical intervention in cases of incomplete abortion or severe bleeding, or, if the physician does not have admitting privileges at a local hospital, has made and documented in the patient's medical record plans to provide such emergency care through other qualified physicians who have agreed in writing to provide such care;

(d) Informs the patient that she may need access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary, as a result of or in connection with the abortion procedure on a twenty-four (24) hour basis. If the appropriate medical facility is other than a local hospital emergency room, the physician shall provide the patient with the name, address and telephone number of such facility in writing; and

(e) Has complied with the informed consent provisions of section 18-609, Idaho Code.

(3) The physician inducing the abortion, or a person acting on behalf of the physician inducing the abortion, shall make reasonable efforts to ensure that the patient returns for a follow-up visit so that a physician can confirm that the pregnancy has been terminated and assess the patient's medical condition.

[Idaho Code § 18-617](#)

Idaho Code § 18-622 Criminal abortion. [Effective until July 1, 2023.]

(1) Notwithstanding any other provision of law, this section shall become effective thirty (30) days following the occurrence of either of the following circumstances:

(a) The issuance of the judgment in any decision of the United States supreme court that restores to the states their authority to prohibit abortion; or

(b) Adoption of an amendment to the United States constitution that restores to the states their authority to prohibit abortion.

(2) Every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than (5) years in prison. The professional license of any health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.

(3) It shall be an affirmative defense to prosecution under subsection (2) of this section and to any disciplinary action by an applicable licensing authority, which must be proven by a preponderance of the evidence, that:

(a) (i) The abortion was performed or attempted by a physician as defined in this chapter;

(ii) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and

(iii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself; or

(b)(i) The abortion was performed or attempted by a physician as defined in this chapter;

(ii) If the woman is not a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion;

(iii) If the woman is a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported the act of rape or incest to a law enforcement agency or child protective services and a copy of such report has been provided to the physician who is to perform the abortion; and

(iv) The physician who performed the abortion complied with the requirements of paragraph (a)(iii) of this subsection regarding the method of abortion.

(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

(5) Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.

18-622. Defense of life act. [Effective July 1, 2023.] *(But see Moyle et al., v. US (No. 23-726), Idaho v. US (No. 23-727), 603 U.S. __ (2024) and [United States v. Idaho, 623 F. Supp. 3d 1096 \(D. Idaho 2022\)](#))*

(1) Except as provided in subsection (2) of this section, every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison. The professional license of any health care professional who performs or attempts to perform an abortion or who assists in performing or attempting to perform an abortion in violation of this subsection shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.

(2) The following shall not be considered criminal abortions for purposes of subsection (1) of this section:

(a) The abortion was performed or attempted by a physician as defined in this chapter and:

(i) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed necessary to prevent the death of the pregnant woman because the physician believes that the woman may or will take action to harm herself; and

(ii) The physician performed or attempted to perform the abortion in the manner that, in his good faith medical judgment and based on the facts known to the physician at the time, provided the best opportunity for the unborn child to survive, unless, in his good faith medical judgment, termination of the pregnancy in that manner would have posed a greater risk of the death of the pregnant woman. No such greater risk shall be deemed to exist because the physician believes that the woman may or will take action to harm herself; or

(b) The abortion was performed or attempted by a physician as defined in this chapter during the first trimester of pregnancy and:

(i) If the woman is not a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman has reported to a law enforcement agency that she is the victim of an act of rape or incest and provided a copy of such report to the physician who is to perform the abortion. The copy of the report shall remain a confidential part of the woman's medical record subject to applicable privacy laws; or

(ii) If the woman is a minor or subject to a guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported to a law enforcement agency or child protective services that she is the victim of an act of rape or incest and a copy of such report has been provided to the physician who is to perform the abortion. The copy of the report shall remain a confidential part of the woman's medical record subject to applicable privacy laws.

(3) If a report concerning an act of rape or incest is made to a law enforcement agency or child protective services pursuant to subsection (2)(b) of this section, then the person who made the report shall, upon request, be entitled to receive a copy of such report within seventy-two (72)

hours of the report being made, provided that the report may be redacted as necessary to avoid interference with an investigation.

(4) Medical treatment provided to a pregnant woman by a health care professional as defined in this chapter that results in the accidental death of, or unintentional injury to, the unborn child shall not be a violation of this section.

(5) Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty.

[Idaho Code § 18-622](#)

18-623. Abortion trafficking. (See *Matsumoto v. Labrador* enjoining “recruiting” prong of the statute, above)

(1) 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.

(2) It shall be an affirmative defense to a prosecution under subsection (1) of this section that a parent or guardian of the pregnant minor consented to trafficking of the minor.

(3) It shall not be an affirmative defense to a prosecution under subsection (1) of this section that the abortion provider or the abortion-inducing drug provider is located in another state.

(4) The Idaho attorney general has the authority, at the attorney general’s sole discretion, to prosecute a person for a criminal violation of this section if the prosecuting attorney authorized to prosecute criminal violations of this section refuses to prosecute violations of any of the provisions of this section by any person without regard to the facts or circumstances.

(5) Any person who commits the crime of abortion trafficking, as provided in subsection (1) of this section, shall be punished by imprisonment in the state prison for no less than two (2) years and no more than five (5) years.

[Idaho Code § 18-623](#)

Idaho Code 18-8804. Abortion following detection of a fetal heartbeat prohibited.

(1) A person may not perform an abortion on a pregnant woman when a fetal heartbeat has been detected, except in the case of a medical emergency, in the case of rape as defined in section 18-6101, Idaho Code, or in the case of incest as described in section 18-6601, Idaho Code.

In the case of rape or incest:

(a) If the woman is not a minor or subject to guardianship, then, prior to the performance of the abortion, the woman has reported the act of rape or incest to a law enforcement agency and provided a copy of such report to the physician who is to perform the abortion; or

(b) If the woman is a minor or subject to guardianship, then, prior to the performance of the abortion, the woman or her parent or guardian has reported the act of rape or incest to a

law enforcement agency or child protective services and a copy of such report have been provided to the physician who is to perform the abortion.

(2) Nothing in this section recognizes a right to abortion before a fetal heartbeat is detected.

**Idaho Code 18-8805. Penalties for violations — Effective upon a certain occurrence.
(superseded by Idaho Code 18-622)**

(1) This section shall become effective thirty (30) days following the issuance of the judgment in any United States appellate court case in which the appellate court upholds a restriction or ban on abortion for a preborn child because a detectable heartbeat is present on the grounds that such restriction or ban does not violate the United States constitution.

(2) Every licensed health care professional who knowingly or recklessly performs or induces an abortion in violation of this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison.

(3) The professional license of any health care professional who performs or induces an abortion or who assists in performing or inducing an abortion in violation of this chapter shall be suspended by the appropriate licensing board for a minimum of six (6) months upon a first offense and shall be permanently revoked upon a subsequent offense.

(4) Nothing in this section shall be construed to conflict with the effectiveness of section 18-622, Idaho Code, following the occurrence of the circumstances described in that section. In the event both this section and section 18-622, Idaho Code, are enforceable, section 18-622, Idaho Code, shall supersede this section.

18-8807. Civil causes of action. [Effective July 1, 2023.]

(1) Any female upon whom an abortion has been attempted or performed, the father of the preborn child, a grandparent of the preborn child, a sibling of the preborn child, or an aunt or uncle of the preborn child may maintain an action for:

(a) All damages from the medical professionals who knowingly or recklessly attempted, performed, or induced the abortion in violation of this chapter;

(b) Notwithstanding any other provision of law, statutory damages in an amount not less than twenty thousand dollars (\$20,000) from the medical professionals who knowingly or recklessly attempted, performed, or induced an abortion in violation of this chapter; and

(c) Costs and attorney's fees.

(2) Notwithstanding any other provision of law, a person may bring an action under this section not later than four (4) years following the date the cause of action accrues.

(3) Notwithstanding any other provision of law, including chapter 1, title 12, Idaho Code, a court may not award costs or attorney's fees to a defendant in an action brought under this section unless the defendant has complied with the applicable requirements of sections 18-8803 and 18-8804, Idaho Code.

(4) The civil causes of action provided for in this section exist independently of any criminal action commenced pursuant to this chapter. A civil cause of action may be pursued under the provisions of this chapter even if a criminal prosecution is not pursued.

(5) Notwithstanding any other provision of law, including chapters 14, 17, and 18, title 54, Idaho Code, the requirements of this section shall be enforced exclusively through the private civil causes of action described. No enforcement of this section may be taken or threatened against any person

by this state, a political subdivision of this state, a prosecuting attorney, or an executive or administrative officer or employee of this state or a political subdivision of this state.

(6) Notwithstanding any other provision of law, this state, a state official, or a prosecuting attorney may not intervene in an action brought under this section. Nothing in this subsection shall prohibit a person described in this subsection from filing an amicus curiae brief in the action.

(7) Nothing in this section shall be deemed to affect any familial rights or responsibilities or any proceedings conducted under Idaho law.

(8) In an action brought under this section, a court may not award compensatory or punitive damages if a person demonstrates that the person paid, or has been ordered to pay, compensatory or punitive damages, respectively, in a previous civil action for that particular violation of this chapter.

(9) Notwithstanding any other law to the contrary, a civil action may not be brought under this section by a person who, through an act of rape, sexual assault, incest, or other criminal conduct, impregnated the pregnant woman seeking an abortion in violation of this chapter.

(10) Notwithstanding any other law to the contrary, the following shall not be defenses to an action brought under this section:

(a) That the pregnant woman or, if the pregnant woman is a minor, a parent or guardian consented to an unlawful abortion;

(b) Ignorance or mistake of law;

(c) A person's belief that any provision of this section is or was unconstitutional;

(d) A person's reliance on a state or federal court decision that is not binding on the court in which the action has been brought;

(e) Non-mutual issue preclusion or non-mutual claim preclusion;

(f) Contributory or comparative negligence;

(g) Assumption of risk; or

(h) A claim that an action brought under the section will violate a constitutional right of a third party.

(11) Notwithstanding any other law to the contrary, a court may:

(a) Not award attorney's fees or costs to a person subject to an action brought under this section unless the action is frivolous, without foundation, or brought in bad faith or for the sole reason for delay;

(b) Not award attorney's fees or costs to a person who prevails in challenging the constitutionality of this section under state law, unless the defense of this section is frivolous, without foundation, or brought in bad faith or for the sole reason for delay; and

(c) Award attorney's fees or costs to a person who prevails in defending the constitutionality of this section under state law, even though the challenge to the constitutionality of this section was not frivolous, without foundation, or brought in bad faith or for the sole reason for delay.

(12) The provisions of this section shall not be construed to impose liability on speech or conduct protected by the first amendment of the United States constitution or by section 9, article I of the constitution of the state of Idaho.

[Idaho Code § 18-8807](#)